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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 480

SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE SECRETARY OF AGRICULTURE

PRIOR OPINIONS

The report of the Commission in 1952 on rehearing and further hearing (I R. 23–23gg) [1] is in 286 I. C. C. 119. The prior report of the Commission in 1948 (I R. 24–24s) is in 272 I. C. C. 648. The opinion of the District Court (I R. 204–215) is in 114 F. Supp. 420.

[1] The printed record consists of three volumes, and volume I of the record is referred to in this brief as "I R," and the subsequent volumes are referred to herein as "II R" and "III R," respectively.

JURISDICTION

This action was instituted to enjoin and set aside certain orders (I R. 25–27, 224) of the Interstate Commerce Commission, and in accordance with the requirement in 28 U. S. C. 1952 ed. § 2325 the cause was heard by a District Court of three judges. The District Court entered its judgment on August 31, 1953, denying the applications to set aside, and to enjoin the enforcement of, the Commission's orders (I R. 203–204). The petition by the Secretary of Agriculture of the United States for an appeal was presented to the District Court on October 28, 1953 (I R. 215); the appeal was allowed by the District Court on October 28, 1953 (I R. 220); and probable jurisdiction was noted by the Supreme Court on February 1, 1954 (III R. 1555). This Court is authorized to review the case on direct appeal pursuant to 28 U. S. C. 1952 ed. §§ 1253 and 2101 (b).

The Secretary of Agriculture intervened, as a matter of right, under Rule 24 (a) of the Federal Rules of Civil Procedure, in the action in the District Court (I R. 201–202). The right of the Secretary of Agriculture to intervene in the proceeding before the Commission, and in the review in the District Court, and to appeal from the judgment of the District Court is conferred by § 201 of the Agricultural Adjustment Act of 1938, as amended (52 Stat. 31, 36, 7 U. S. C. 1952 ed.

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§ 1291), in which it is provided, *inter alia,* that the Secretary may, as a matter of right, intervene in a proceeding before the Interstate Commerce Commission relative to the regulation of the transportation of agricultural commodities and products and in "such case the Secretary shall have the rights of a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination" (7 U. S. C. 1952 ed. § 1291 (b)). The Secretary's participation in this case is also authorized by § 203 (j) of the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088–1089, 7 U. S. C. 1952 ed. § 1622 (j)), by § 17 (9) of the Interstate Commerce Act (54 Stat. 916, 49 U. S. C. § 17 (9)), by 28 U. S. C. 1952 ed. §§ 1253 and 2323, and by § 10 of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1952 ed. § 1009).

QUESTIONS PRESENTED

The line-haul freight rate established by railroad carriers in the United States, i. e., the published freight rate between cities, includes delivery of the freight to the consignee. Delivery is generally effected by placing the loaded freight car on a team track at a location accessible to the consignee. However, the team-track facilities at New York are adequate to handle only a small part of the great volume of fruits and vegetables received at New York, and the carriers move the

freight cars, by means of car floats, across the Hudson River from Jersey City, New Jersey, and vicinity to the piers at New York, and the unloading of the cars is performed by the carriers. The shippers are not permitted access to the cars on the car floats. Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor. That method of making delivery of freight at New York is the most economical method whereby the carriers may deliver the vast volume of freight shipped to New York, and no charge for such delivery, other than the line-haul rate, has been made for over fifty years prior to the imposition of the charges in this case. The unloading of fresh fruits and vegetables is also performed by the carriers at certain terminals in Philadelphia, Pennsylvania, and the shipper is not permitted access to the cars at those terminals. Delivery to the consignee is not effected until after the cars are unloaded. No charge for such delivery at Philadelphia, other than the line-haul rate, has been made for over fifty years prior to the imposition of the charges challenged in this case. At the hearing before the Interstate Commerce Commission to determine the validity of proposed charges for making delivery of fresh fruits and vegetables at New York and Philadelphia, no evidence was introduced to show that the carriers are not adequately compensated, for such delivery, by their line-haul rates. The Com-

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mission did not determine whether the proposed aggregate charges, consisting of the line-haul rates plus the proposed delivery charges, are just and reasonable for the transportation of the fresh fruits and vegetables, including delivery. In these circumstances, the questions are:

(1) Whether the Commission has authority to approve separate charges by the appellee railroad carriers, for making delivery of fresh fruits and vegetables at New York and Philadelphia, and if so whether the Commission may approve the separate charges without determining whether the line-haul rates plus the delivery charges, i. e., the entire charges for the transportation, including delivery, are just and reasonable.

(2) Whether the delivery charges on fresh fruits and vegetables at New York are unjust discriminations and undue or unreasonable prejudices or disadvantages in violation of sections 2 and 3 (1) of the Interstate Commerce Act inasmuch as no similar charges are imposed on any other freight delivered by the carriers at New York, including other similar perishable agricultural commodities, e. g., butter, cheese, eggs, dressed poultry, fresh meat, fish, oysters, and raw milk.

(3) Whether the orders of the Commission, establishing identical charges for making delivery at New York and Philadelphia even though it is conceded that the costs for making delivery at Philadelphia are substantially lower than at New

York, are supported by substantial evidence and adequate findings.

(4) Whether substantial evidence on the record as a whole and adequate findings support the Commission's orders.

STATUTES INVOLVED

The statute primarily involved is Part I of the Interstate Commerce Act, as amended (24 Stat. 379, as amended; 49 U. S. C. § 1 *et seq.*). The pertinent provisions of the Interstate Commerce Act, as amended (24 Stat. 379, as amended; 49 U. S. C. § 1 *et seq.*), the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088–1089; 7 U. S. C. 1952 ed. § 1621), and the Agricultural Adjustment Act of 1938 (52 Stat. 31, 36; 7 U. S. C. 1952 ed. § 1291) are set forth in the Appendix, *infra,* pp. 91–101.

STATEMENT

This case involves the validity of the approval (I R. 25–27, 224) by the Interstate Commerce Commission of separate charges, in addition to the line-haul freight rates, proposed by the appellee railroad carriers for making delivery of fresh fruits and vegetables at New York and Philadelphia.

1. THE ADMINISTRATIVE PROCEEDINGS

The delivery charges challenged in this proceeding were filed with the Commission to become effective on June 1, 1947, but the tariffs were suspended by the Commission's order of May 28,

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1947, pending an investigation of the lawfulness of the charges (I R. 224). In its report dated October 4, 1948, the Commission, with Chairman Lee and Commissioners Aitchison, Splawn, and Alldredge dissenting, and Commissioner Patterson not participating, found the proposed charges "just and reasonable" (I R. 24r; 272 I. C. C. 648, 663).[2] Thereafter the charges, ranging from $1.95 to $2.60 per net ton, i. e., approximately $35 to $47 per car, became effective on November 1, 1948. These charges were 30% higher than the charges originally proposed because of a general increase in all railroad rates and charges authorized by the Commission (I R. 23b). In December 1948, various petitions were filed with the Commission seeking to have the proceeding reopened and on June 9, 1949, the Commission reopened the proceeding for rehearing. After receiving additional evidence the two Hearing Examiners for the Commission issued their report recommending that the Commission "should find that the charges assailed for unloading fresh fruits and vegetables, in carloads, at New York and Philadelphia are unjust and unreasonable, and that the findings in the prior report herein should be reversed" (I R. 80).

[2] The report of the Commission in 1948 is entitled *Unloading Charges on Fruits and Vegetables at New York and Philadelphia* and is cited throughout this brief as "(I R. —; 272 I. C. C. 648, —)" indicating the relevant pages in the printed record in this case and in 272 I. C. C.

Subsequently, the Commission issued a notice that the record "is deficient in respect of certain evidence which seems to be important, and the proceeding will be assigned for further hearing" (I R. 293). Further evidence was received and the Hearing Examiner issued a report recommending that upon further hearing "the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of section 3 (1) of the act" (I R. 115–116).

The report of the Commission dated May 7, 1952, reversed the findings and conclusions by the Examiners and approved the proposed delivery charges at New York and Philadelphia at reduced rates varying from $1.05 to $1.65 per net ton (I R. 23–23cc; 286 I. C. C. 119, 119–142).[3] On September 16, 1952, and on September 23, 1952, certain of the plaintiffs filed complaints with the Commission attacking the delivery charges at New York and Philadelphia, respectively (I R. 28–41; III R. 1544–1545, 1549–1550), and on December 15, 1952, the Commission, on motion and without further hearing, dismissed these complaints (I R. 26–27).

[3] The report of the Commission in 1952 is entitled *Unloading Charges on Fruits and Vegetables at New York and Philadelphia* and is cited throughout this brief as "(I R. —; 286 I. C. C. 119, —)" indicating the relevant pages in the printed record in this case and in 286 I. C. C.

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2. THE PARTIES IN THE DISTRICT COURT

This action was instituted in the United States District Court for the Southern District of Florida, Orlando Division, by the Florida Citrus Commission, Growers and Shippers League of Florida, Chase and Company, Nevins Fruit Company, and Dr. P. Phillips Cooperative to enjoin and set aside the orders of the Interstate Commerce Commission approving the proposed delivery charges (I R. 1–22). The Secretary of Agriculture of the United States intervened in the District Court proceeding (I R. 201–202), and also numerous other parties intervened in the proceeding in the District Court to enjoin and set aside the Commission's orders, viz., The City of New York, The Port of New York Authority, California Citrus League, California Grape and Tree Fruit League, Philadelphia Terminals Marketing Association, The Auction Receivers of Philadelphia, Dan Storey, Jr., Max Feldbaum and Sons, A. Cancelmo Company, B. M. Young, New York Fruit Auction Corporation, United Fruit Buyers Association, Inc., United Fresh Fruit and Vegetable Association, Idaho Shippers Association, Inc., National Onion Association, and Western Growers Association (I R. 201–202).

The United States was made a defendant in accordance with the requirement in 28 U. S. C. 1952 ed. § 2322, but the United States remained neutral in the litigation (I R. 199–201).

The Baltimore & Ohio Railroad Company, Erie Railroad, New York Central Railroad Company, Pennsylvania Railroad Company, and Reading Company intervened to defend the action of the Commission approving their proposed delivery charges (I R. 202–203).

3. DECISION OF THE DISTRICT COURT

The District Court held, with one Judge dissenting, that the orders of the Commission approving the delivery charges were valid (I R. 208; 114 F. Supp. 420).[4] The majority opinion reiterated the Commission's finding "that pier station unloading by the carrier in New York is essential, as the team tracks are inadequate, cannot be enlarged, and there are no physical means by which the consignee's trucks may reach the car floats" (I R. 213; 114 F. Supp. at 424). But the majority of the Court concluded that the Commission could approve separate charges for making delivery of fruits and vegetables at New York and Philadelphia without considering the reasonableness of the line-haul rates inasmuch as the majority of the Court believed that "the Commission found that the line haul service terminated when the cars reached the pier station * * *" (I R. 214; 114 F. Supp. at 424).

Judge Dozier A. DeVane, dissenting, stated

[4] The opinion of the District Court is in the case of *Florida Citrus Commission* v. *United States*, 114 F. Supp. 420 (S. D. Fla.).

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that the "majority enlarges the authority of the Interstate Commerce Commission over specific freight rates to unprecedented and unauthorized limits" (I R. 204; 114 F. Supp. at 425), and in concluding that the Commission's orders are illegal Judge DeVane set forth the "following undisputed factual questions" which, in his opinion, are controlling in the case:

> 1. Unloading at New York was originally inaugurated by the carriers concerned for their own convenience and benefit.
>
> 2. It is now and always has been the most economical way the carriers may make deliveries of freight at New York.
>
> 3. The line-haul rates were originally established to include and have always included compensation for unloading costs at New York. The Interstate Commerce Commission has so held in numerous cases.
>
> 4. When the unloading charges were made effective by the Interstate Commerce Commission the line-haul rates were then, and are now, in excess of just and reasonable rates based upon the cost of transporting and unloading fruits and vegetables at New York (I R. 205; 114 F. Supp. at 425–426).

In these circumstances, Judge DeVane concluded that the Commission could not approve the proposed charges without determining the reasonableness of the line-haul rates (I. R. 205–

207; 114 F. Supp. at 426). Judge DeVane also concluded that the evidence in this case "clearly establishes a violation of Sections 2 and 3 (1) of the Act" inasmuch as "unloading charges are made applicable only to fruits and vegetables, while other similar perishable products, such as butter, butter solids, cheese, eggs, dressed poultry, fresh meat, fish, oysters and raw milk, are unloaded by the carrier without the imposition of any unloading charges" (I R. 205–206; 114 F. Supp. at 426).

4. INTEREST OF THE SECRETARY OF AGRICULTURE OF THE UNITED STATES

The Secretary of Agriculture of the United States is interested in this proceeding as the representative of the agricultural community in the United States. The additional charges for the transportation of fresh fruits and vegetables approved by the Commission will aggregate several million dollars each year, and will be borne to a large extent by the American farmers (II R. 909–910, 943, 961–962, 968, 969, 975). Even if the unloading or delivery charges can be partially shifted to the consumers, the charges will, nonetheless, widen the spread between the price received by the producer and the price paid by the consumer (I R. 552; II R. 582, 591), which is contrary to the expressed purpose of Congress (7 U. S. C. 1952 ed. § 1621) to provide for "an integrated administration of all laws enacted by

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Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and *the price spread between the producer and consumer may be narrowed* * * *." [Emphasis supplied.]

The level and structure of freight rates have been of great concern to the agricultural industry for a long time. *The Transportation Problem of Agriculture,* 1940 Year Book of Agriculture, p. 723; Aitchison, *The Evolution of the Interstate Commerce Act:* 1887–1937, 5 George Washington L. Rev. 296 (1937). The Secretary of Agriculture "is authorized to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same before the Commission" (7 U. S. C. 1952 ed. § 1291 (a)). Also, the Secretary of Agriculture "is authorized to cooperate with and assist cooperative associations of farmers making complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products" (7 U. S. C. 1952 ed. § 1291 (d)).

It is the position of the Secretary of Agriculture that the Commission's orders approving the delivery charges (I R. 25, 224), and the Commission's order of December 15, 1952, dismissing the

complaints attacking the delivery charges (I R. 26–27) are invalid and should be set aside and enjoined.

5. ECONOMIC CONSEQUENCES OF THE DELIVERY CHARGES THAT ARE CHALLENGED IN THIS CASE

The wholesale marketing facilities for fresh fruits and vegetables in New York and Philadelphia are centered around the railroad facilities in those cities, and the marketing enterprise is dependent to a large degree on the continued maintenance of reasonable and adequate transportation by the rail carriers. The delivery charges attacked in this proceeding, if allowed to remain in effect, will substantially disrupt the marketing of fresh fruits and vegetables in New York and Philadelphia. For example, the Commission found that when the delivery charges became effective the consignees attempted to avoid the charges by taking delivery at outlying team-track stations and paying the cost of trucking the commodities into market or by shifting from rail to motor trucks for the entire transportation (I R. 23h–23i; 286 I. C. C. 119, 125–126). In February 1949, deliveries of fresh fruits and vegetables to the New York piers were about 50% less than in February 1948 (I R. 23i; 286 I. C. C. 119, 126). Similar traffic to New York by truck and vessel increased substantially in February 1949 compared with February 1948 (I R. 23i; 286 I. C. C. 119, 126). Later statistics reveal a con-

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tinuation of this trend. In 1952 only 80,989 carlots of fresh fruits and vegetables were unloaded from railroad freight cars at New York City [5] as compared with 114,538 carlots similarly unloaded in 1947.[6] The truck receipts at wholesale and farm markets in New York City have increased from 61,265 carlot equivalents to 65,712 carlot equivalents during the same period.[7] The Commission found that the "diversion of rail shipments from pier stations to other points intensified the problems of the New York produce market, resulting in greater congestion in terminal handling, and in dissatisfaction among buyers, labor, and other elements at that facility" (I R. 23i; 286 I. C. C. 119, 126).

In addition, the report of the Commission states that the City of New York was "planning to rehabilitate its piers at a cost of $78,000,000, but it is intimated that it may not proceed with that program" if the charges for making delivery at the New York piers remain in effect (I R. 23m; 286 I. C. C. 119, 129). "The New York water

[5] *Unloads of Fresh Fruits and Vegetables at New York City, 1952* (U. S. Department of Agriculture, Fruit and Vegetable Branch), p. 6.

[6] *Unloads of Fresh Fruits and Vegetables at New York City, 1947* (U. S. Department of Agriculture, Fruit and Vegetable Branch), p. 4.

[7] *Unloads of Fresh Fruits and Vegetables at New York City, 1947* (U. S. Department of Agriculture, Fruit and Vegetable Branch), p. 4; *Unloads of Fresh Fruits and Vegetables at New York City, 1952* (U. S. Department of Agriculture, Fruit and Vegetable Branch), p. 6.

front contributes from 25 to 40 percent of the basic economy of that city" and the city officials are seriously concerned about the adverse effects which will result from a continuance of the challenged charges (I R. 23m; 286 I. C. C. 119, 129–130). The Port of New York Authority has also temporarily abandoned plans for the construction of a union waterfront terminal at a cost of $27,000,000, in substantially the same location as the pier terminals, because of the disruptive effects of the charges involved in this case (I R. 23m–23n; 286 I. C. C. 119, 130). The Port Authority's plan "called for a structure stretching nearly one-half mile along the North River waterfront, between Duane and Watts Streets" and would have provided a "shedded area equivalent to ten Madison Square gardens."[8] The aggregate savings in the handling of fruits and vegetables at New York as a result of the construction of a union waterfront terminal was conservatively estimated at $9,000,000 per year.[9]

The need for improving the marketing facilities for fresh fruits and vegetables at New York has

[8] *Restudy of Proposal for Development of the Municipally Owned Waterfront and Piers of New York City* (The Port of New York Authority, April 27, 1949), pp. 3–4. See also, *Proposal for Development of the Municipally Owned Waterfront and Piers of New York City* (The Port of New York Authority, February 10, 1948), pp. 28, 36–37, 69–83.

[9] *Restudy of Proposal for Development of the Municipally Owned Waterfront and Piers of New York City* (The Port of New York Authority, April 27, 1949), p. 4.

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been recognized by all persons familiar with the present marketing conditions.[10] The charges for making delivery at the New York piers imposed on November 1, 1948, have prevented the fruition of the plans proposed by the City of New York and the Port of New York Authority for the modernization of the piers and market, and these delivery charges have caused inestimable damage to the agricultural interests.

With respect to Philadelphia, there has been a trend since 1930 toward diversion from the railroads to the trucks of the fruit and vegetable traffic consigned to Philadelphia, and the Commission found that the charges attacked in this case "will further divert the fruit and vegetable traffic from the [railroads'] produce terminals" (I R. 23u; 286 I. C. C. 119, 136). The challenged charges at Philadelphia are also causing some dealers to buy their produce at other cities and, as a result, the entire produce business at Philadelphia will suffer irreparable damage if the delivery charges remain in effect (I R. 23t–23w; 286 I. C. C. 119, 135–137).

[10] See e. g., *Annual Report of the New York State Temporary Commission on Agriculture*, 1953–54 (Legislative Document (1954) No. 24, pp. 2–3, 18–24); *The Wholesale Fruit and Vegetable Markets of New York City* (U. S. Department of Agriculture, April 1940), pp. 48–53.

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

1. In holding and concluding that the Commission has authority to approve separate charges by the appellee railroad carriers, in addition to their line-haul rates, for delivering fresh fruits and vegetables at New York and Philadelphia, and that such charges may be approved by the Commission without determining whether the line-haul rates plus the delivery charges, i. e., the entire charges for the transportation, including delivery, are just and reasonable.

2. In failing to hold that the delivery charges on fresh fruits and vegetables at New York are unjust discriminations and undue and unreasonable prejudices or disadvantages in violation of sections 2 and 3 (1) of the Interstate Commerce Act inasmuch as no similar charges are imposed on any other freight delivered by the carriers at the New York piers, including other similar perishable agricultural commodities, e. g., butter, cheese, eggs, dressed poultry, fresh meat, fish, oysters, and raw milk.

3. In holding and concluding that adequate findings and substantial evidence, on the record as a whole, support the orders by the Commission.

4. In holding and concluding that the orders of the Commission, establishing identical delivery charges at New York and Philadelphia even though it is conceded that delivery costs at Phila-

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delphia are substantially lower than at New York, are supported by substantial evidence and adequate findings.

5. In holding and concluding that the Commission found: (a) that unloading is an additional service, wholly distinct from delivery; (b) that the method of unloading at New York saves the payment of switching charges "by the consignee"; and (c) that the line-haul service, prior to November 1, 1948, terminated when the cars reached the pier station.

6. In failing to suspend, enjoin, annul, and set aside the parts of the Commission's orders which approve the imposition of delivery charges at New York and Philadelphia in addition to the line-haul rates, and the Commission's order of December 15, 1952, dismissing the complaints attacking such delivery charges.

SUMMARY OF ARGUMENT

I

The issues in this case relate to the action of the Interstate Commerce Commission in approving separate charges by the railroads for delivering fresh fruits and vegetables at the New York piers and at the produce terminal platforms in Philadelphia.

The railroads have been compensated for over 50 years by their line-haul rates for unloading, i. e. delivering, fresh fruits and vegetables at the New York piers and at the produce terminal

platforms in Philadelphia. The Commission found that no separate charges "such as those under consideration have applied to this traffic in the past," and prior to November 1, 1948, when the unloading or delivery charges became effective, "there were no separate charges in addition to the through rates, for unloading fruits, vegetables, or other descriptions of traffic * * *" (I R. 23b; 286 I. C. C. 119, 120–121). Also the answer of the Commission, in this case in the District Court, admits that "separate charges for unloading said commodities at New York and Philadelphia were not assessed by the said railroads prior to November 1, 1948" (I R. 179).

The Commission found that in New York the "pier floor is the first place where, after the freight has been unloaded, delivery can be taken" by the consignees, and at the produce terminal platforms in Philadelphia the consignees are not permitted access to the cars prior to the unloading by the railroads (I R. 23g, 23r–23t; 286 I. C. C. 119, 125, 134–135). The special and distinctive circumstances at the New York piers are such that delivery cannot be made by the railroads without first unloading the freight. The Commission found that "it would be impracticable, if not impossible, to expand rail facilities on Manhattan to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York" (I R. 23n; 286 I. C. C. 119, 130). Instead of delivering the

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fruits and vegetables at team tracks, the carriers place the freight cars on car floats at Jersey City, New Jersey, and vicinity and then by means of tug boats move the cars across the Hudson River to the New York piers. The Commission found that there "are no physical means by which consignees' trucks can reach the car floats," and the "pier floor is the first place where, after the freight has been unloaded, delivery can be taken" (I R. 23g; 286 I. C. C. 119, 125). Unloading by the carriers is essential to delivery, and the method of delivery used by the railroads at the New York piers is the most economical method whereby the railroads may deliver the vast volume of freight at the piers.

The line-haul rates, for shipments to the New York piers and to the produce terminal platforms in Philadelphia, include compensation to the railroads for unloading, i. e., delivering, the fresh fruits and vegetables. In prior proceedings, involving the line haul rates, the railroads have "emphasized the magnitude of their terminal costs, including unloading by them of the traffic as an essential part of delivery * * *" (I R. 114). The line-haul rates include compensation for unloading the freight, i. e., delivery, and the line-haul rates have been divided between carriers on the basis of evidence relative to the expenses incurred by the railroads in unloading the freight. See, e. g., *Fruits and Vegetables to Duane St., N. Y.*, 66 I. C. C. 135, 139; *Erie R. R.*

Co. v. *Alabama & V. Ry. Co.*, 98 I. C. C. 268, 281. The carriers have recognized, in proceedings before the Commission, that the line-haul rates include compensation to the carriers for unloading the freight. Also it cannot be assumed that the railroads gratuitously performed, for more than 50 years, the unloading or delivery service in New York and Philadelphia. *Interstate Commerce Commission* v. *Chicago &c R'd. Co.*, 186 U. S. 320, 336; *American Express Co.* v. *United States*, 212 U. S. 522, 526–527, 532; *United States* v. *Wabash R. Co.*, 321 U. S. 403, 406; *Ex parte No. 104*, 209 I. C. C. 11, 20.

The reasonableness of the line-haul rates, including compensation for unloading the freight, is presumed to continue in the absence of a showing to the contrary. *Swift & Co.* v. *United States*, 343 U. S. 373, 382–383; *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U. S. 368, 379. But in this proceeding the Commission approved the separate charges, for unloading, i. e., delivering, the freight, without making any finding or receiving any evidence as to whether the line-haul rates plus the unloading or delivery charges—i. e., the entire charges for the transportation, including delivery—are just and reasonable.

The railroads are obligated to make delivery, and the principle is established that a separate charge for making delivery is illegal. In circumstances where unloading is an accessorial service

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distinct from delivery, its "cost may be included in the line-haul tariffs or separately fixed or allowed as an additional charge." *Railroad Board* v. *Duquesne Co.*, 326 U. S. 446, 453. But there is no statutable requirement that an unloading charge be separately stated, and where unloading is an essential part of delivery a separate charge for making delivery is not permissible.

Assuming, however, that a separate charge may, under some circumstances, be imposed by a carrier for making delivery, nonetheless the approval by the Commission of separate charges in this case is illegal because the Commission did not find that the entire charges for the transportation—consisting of the line-haul rates plus the delivery charges—are just and reasonable. The line-haul rates included, prior to this proceeding, compensation to the carriers for unloading, i. e., delivery, and it is impossible to determine whether an additional charge for delivery is just and reasonable without reconsidering the entire line-haul rates. A carrier should not be permitted to multiply its revenue by merely dividing its rates. The Commission cannot, under the circumstances of this case, approve as just and reasonable separate charges for a service for which compensation is included under the line-haul rates unless the Commission finds that the line-haul rates and the separate charges are, in their entirety, just and reasonable for the entire transportation services. The record contains no finding and no evi-

dence to support a finding that the line-haul rates and the separate charges for delivery are just and reasonable. Hence, the orders of approval by the Commission are invalid, and should be set aside and enjoined.

II

The Commission's orders of approval are also invalid because they are not based on substantial evidence, on the record as a whole, or on adequate findings.

The Commission found that the "[u]nloading operations are less expensive at Philadelphia than at New York" (I R. 23d; 286 I. C. C. 119, 122). But the Commission's orders gave approval to identical charges for making delivery in New York and in Philadelphia (I R. 24r; 272 I. C. C. 648, 663; I R. 23bb; 286 I. C. C. 119, 141). Nothing is revealed in the findings by the Commission as to why the charges should be the same in both cities even though the delivery costs are substantially higher at the New York piers. The findings merely assert the desirability of a parity of charges. The findings fall far short of the criteria of clarity and completeness which were held to be necessary in *Automatic Canteen Co.* v. *Federal Trade Comm.*, 346 U. S. 61, 81; *New York* v. *United States*, 331 U. S. 284, 301–310; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 583; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488–489.

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In addition to the inadequacy of the findings, the record contains no evidence which would warrant a finding that the charges for unloading should be the same in Philadelphia as at the New York piers.

III

The separate charges for unloading, i. e., delivering, are applicable only to fresh fruits and vegetables. No separate charge is imposed for unloading or delivering other similar freight. To make an additional charge on fresh fruits and vegetables and then make no charge for the same transportation service for "a like kind of traffic" is on its face an unjust discrimination, and violative of § 2 of the Interstate Commerce Act (49 U. S. C. § 2). Moreover, the failure to impose the separate charges on other similar traffic creates an undue or unreasonable preference in violation of § 3 (1) of the Act (49 U. S. C. § 3 (1)), and subjects the traffic in fresh fruits and vegetables to an undue or unreasonable prejudice in violation of § 3 (1) of the Act. Charging different rates for equal service is a plain case of unlawful discrimination. It is not enough for the Commission to say, as it did in this proceeding in 1948, that the railroads are giving consideration to the establishment of comparable charges on other similar traffic. The Commission's findings fail to reveal any basis for the discrimination, and the findings are inadequate.

ARGUMENT

I. THE LINE-HAUL RATES INCLUDE COMPENSATION FOR UNLOADING, I. E. DELIVERY, AND SEPARATE CHARGES FOR DELIVERY ARE INVALID; AND ALSO THE SEPARATE CHARGES FOR DELIVERY ARE INVALID BECAUSE THE COMMISSION FAILED TO FIND, OR RECEIVE EVIDENCE WHICH WOULD WARRANT THE FINDING, THAT THE ENTIRE CHARGES FOR THE TRANSPORTATION, CONSISTING OF THE LINE-HAUL RATES PLUS THE DELIVERY CHARGES, ARE JUST AND REASONABLE

The line-haul rates have, for more than 50 years, included compensation to the railroads for unloading, i. e., delivering, fresh fruits and vegetables at the New York piers and at the produce terminal platforms in Philadelphia which are referred to in this litigation (I R. 23b–23c; 286 I. C. C. 119, 120–121). "No [unloading or delivery] charges such as those under consideration have applied to this traffic in the past," and prior to November 1, 1948, when the unloading or delivery charges became effective, "there were no separate charges in addition to the through rates, for unloading fruits, vegetables, or other descriptions of traffic * * *" (I R. 23b, 23c; 286 I. C. C. 119, 120–121). The answer of the Commission in this proceeding in the District Court admits that "separate charges for unloading said commodities at New York and Philadelphia were not assessed by the said roalroads prior to November 1, 1948" (I R. 179).

In prior proceedings, involving the line-haul rates to the New York piers and the produce terminal platforms in Philadelphia, the railroads

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"emphasized the magnitude of their terminal costs, including unloading by them of the traffic as an essential part of delivery * * *" (I R. 114). The line-haul rates have included compensation for delivery, including unloading. *Fruits and Vegetables to Duane St., N. Y.*, 66 I. C. C. 135, 139. The unloading services at the New York piers are essential to the delivery of fresh fruits and vegetables and are "in no sense * * * special services comparable with refrigeration, reconsignment, or switching after placement at [the] unloading point." *Ibid.* Also, the "delivery service performed at New York on all traffic is recognized by the other carriers east of Chicago by allowing to the delivering line" a certain sum "prior to prorating the revenue accruing east of Chicago." *Erie R. R. Co.* v. *Alabama & V. Ry. Co.*, 98 I. C. C. 268, 281. The carriers have recognized, in proceedings before the Commission, that the "unloading cost at New York piers * * * is a necessary part of the through rate,"[11] and under "the rate it is

[11] See, e. g., the testimony by T. C. Powell, vice president of the Erie Railroad, in the proceeding of *Erie R. R. Co.* v. *Alabama & V. Ry. Co.*, Doc. No. 14244, 98 I. C. C. 268, Vol. II, p. 84, of the transcript of the record. The attorney for the Erie Railroad stated also that "under our tariffs to New York pier stations all carload freight is unloaded by the carrier * * *." *Id.* at p. 289. The transcript of the record in that proceeding is a public record on file in the National Archives, and is available for public and official use. 44 U. S. C. § 300c; 44 CFR 1.1 *et seq.*

our obligation to unload the freight on to the pier * * *."[12] The line-haul rates, as approved by the Commission, to the New York piers and to the produce terminal platforms in Philadelphia include compensation to the carriers for unloading the freight, i. e., making delivery, and the line-haul rates have been divided between carriers on the basis of evidence with respect to the expense of unloading at the New York piers and at the produce terminal platforms in Philadelphia, *infra,* pp. 36–53. The reasonablness of the line-haul rates, including compensation to the carriers for unloading the freight at the New York piers and at the produce terminal platforms in Philadelphia, is presumed to continue in the absence of a showing to the contrary. *Swift & Co.* v. *United States,* 343 U. S. 373, 382–383; *Interstate Commerce Commission* v. *Hoboken R. Co.,* 320 U. S. 368, 379.

A carrier cannot impose or receive a separate charge "in excess of the tariff rate for having performed a service covered by the tariff" (*Chesapeake & O. Ry. Co.* v. *Westinghouse Co.,* 270 U. S. 260, 266), and in this proceeding the line-haul rates include compensation for unloading, i. e., delivering, at the New York piers and

[12] Exceptions, p. 23, filed on behalf of the Erie Railroad *et al.* in *Erie R. R. Co.* v. *Alabama & V. Ry. Co.*, Doc. No. 14244, 98 I. C. C. 268. The Exceptions are a part of the transcript of the record in that proceeding, see footnote 11, *supra*, p. 27.

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at the produce terminal platforms in Philadelphia. But in this proceeding the Commission approved the unloading, i. e., delivery, charges at the New York piers and at the platforms in Philadelphia without making any finding or receiving any evidence as to whether the line-haul rates plus the unloading or delivery charges—i. e., the entire charges for the transportation, including delivery—are just and reasonable.

The special and distinctive circumstances at the New York piers are such that delivery cannot be made by the railroads without first unloading the freight (I R. 23d–23h; 286 I. C. C. 119, 122–125). The line-haul rates have, for more than 50 years, included compensation for the unloading or delivery of the freight, and the Commission found, in this proceeding, that the separate charges which the Commission approved are "for making delivery" and that the "pier floor is the first place where, after the freight has been unloaded, delivery can be taken" (I R. 23g, 23m; 286 I. C. C. 119, 125, 129). Also the unloading charges are applicable at platforms in Philadelphia where the consignees are not permitted to obtain the freight until after it is unloaded by the carriers (I R. 23r–23t; 286 I. C. C. 119, 133–135).

The line-haul rates include compensation for delivery, and separate charges for delivery cannot be approved, and in any event the Commission cannot approve separate charges for unload-

ing, i. e., delivery, under the uncontroverted circumstances of this case, because the Commission failed to reconsider the reasonableness of the line-haul rates and made no finding and received no evidence that the line-haul rates plus the unloading charges are just and reasonable.

A. THE RAILROADS HAVE BEEN COMPENSATED FOR OVER 50 YEARS BY THEIR LINE-HAUL RATES FOR UNLOADING FRESH FRUITS AND VEGETABLES AT THE NEW YORK PIERS AND AT THE PLATFORMS IN PHILADELPHIA, AND THE UNLOADING IS AN ESSENTIAL PART OF DELIVERY

1. *The Commission Found That the Unloading Is Essential to Delivery*

The New York area has received annually, in recent years, over 100,000 carloads of fresh fruits and vegetables by rail (I R. 23h; 286 I. C. C. 119, 125). The Commission found that the team-track facilities at New York are adequate to handle only a small portion of this great volume of freight traffic (I R. 230; 286 I. C. C. 119, 131), and that "it would be impracticable, if not impossible, to expand rail facilities on Manhattan to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York" (I R. 23n; 286 I. C. C. 119, 130). Instead of delivering the fruits and vegetables at team tracks, the carriers place the freight cars on car floats at Jersey City, New Jersey, and vicinity and move the cars across the Hudson River by tugboats to the piers at New York (I R.

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23d–23h; 286 I. C. C. 119, 122–125).[13] The carriers then unload the cars, and the cars are immediately returned empty to the New Jersey side and other car floats are placed at the piers for unloading. The Commission found that there "are no physical means by which consignees' trucks can reach the car floats. Consignees have, however, access to the cars on the car float for the purposes of inspection, but they are not permitted to take delivery of their freight from that facility. The pier floor is the first place where, after the freight has been unloaded, delivery can be taken" (I R. 23g; 286 I. C. C. 119, 125). That finding by the Commission in 1952 is consonant with the Commission's findings in 1948 that a "reasonable and proper conclusion as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is ready and available for actual delivery to the consignee. The shippers are not permitted access to the cars, and their trucks can come onto the pier floor only at specified times. Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor" (I R. 24h–24i; 272 I. C. C. 648, 654–655). At the

[13] The New York Central has the only all-rail line into Manhattan for the delivery of freight. The Commission found that this line has "limited capacity and could not handle expeditiously the volume of fruits and vegetables delivered to the New York market even if its facilities were opened to other carriers" (I R. 23f; 286 I. C. C. 119, 124).

original hearing in this matter, the railroads asserted that they were willing to permit the consignees to unload their freight from the car floats. Following the Commission's decision in this proceeding in 1948, the California Fruit Growers Exchange requested the railroads to permit the consignees, as a whole, to perform the unloading at the piers, but the request was refused by the railroads (I R. 23h; 286 I. C. C. 119, 125).

The railroads have also historically unloaded fresh fruits and vegetables at certain terminals in Philadelphia without any charge other than the line-haul rates (I R. 23c; 286 I. C. C. 119, 121). From 1927 until November 1, 1948, when the challenged delivery charges went into effect, approximately 95% of the fresh fruits and vegetables consigned to Philadelphia, other than for chain stores, was handled at the Pennsylvania Produce Terminal at which the cars were unloaded under the line-haul rates by the railroad carriers (I R. 23c, 23r; 286 I. C. C. 119, 121, 134). The shippers are not permitted access to the cars prior to the unloading at the Pennsylvania Produce Terminal and delivery is not made until the cars have been unloaded by the carrier (I R. 23r–23u; 286 I. C. C. 119, 133–135).

Team-track delivery is not available to the consignees at the New York piers or at the produce terminal platforms in Philadelphia at which the unloading charges, as approved by the Commission, are applicable. In short, the Commission

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found that in New York the "pier floor is the first place where, after the freight has been unloaded, delivery can be taken," and at the platforms in Philadelphia the consignees are not permitted access to the cars prior to the unloading by the railroads (I R. 23g, 23r–23t; 286 I. C. C. 119, 125, 134–135). This is consonant with the Commission's decision, with respect to delivery at the New York piers, in *Allowances for Stacking,* 179 I. C. C. 780, 782, in which the Commission held that the carriers "make delivery in spaces assigned to the consignees on the piers, and * * * [their] stevedores stack the packages in those spaces. It appears from this record that at that point respondent has fulfilled its legal obligation as to delivery."

2. *The Commission Found That Pier-Station Delivery at New York, Including Unloading, Is the Most Economical Method for Railroads To Deliver the Vast Volume of Freight*

The team-track facilities of New York are adequate to handle only a small portion of the vast volume of fresh fruits and vegetables shipped to New York (I R. 23o; 286 I. C. C. 119, 131), and, since the latter part of the nineteenth century, the carriers have provided pier-station delivery in lieu of team-track delivery. The piers have no team-track facilities on which cars can be unloaded, and all parties to the proceeding before the Commission agreed that "it is not feasible to

expand the present team-track facilities on Manhattan Island" (I R. 23f; 286 I. C. C. 119, 123). The area covered by the piers is approximately 40 acres, and consists of the piers and the slips between the piers which accommodate the car floats (I R. 23f; 286 I. C. C. 119, 123). The real estate in that vicinity has a value of about $800,000 an acre, and the area covered by the piers has a value of approximately $32,000,000 (I R. 23f; 286 I. C. C. 119, 123). It was estimated that it would cost approximately $24,000,000 to expand the team-track facilities of the Pennsylvania and Erie Railroads (I R. 23q; 286 I. C. C. 119, 133).[14] It would be "impracticable, if not impossible, to expand rail facilities on Manhattan to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York" (I R. 23n; 286 I. C. C. 119, 130). The Commission found that "it is apparent that pier-station deliveries in Manhattan are accomplished by respondents handling the great bulk of the traffic at costs that are, in the aggregate, somewhat less than the protestants' estimated costs that would be incurred by respondents for expanded team-track deliveries * * *" (I R. 23r; 286 I. C. C. 119, 133).

[14] The street on which this area is situated is "one of the deep and narrow canyons on this densely populated island," and the section of the street thus used "is in the very shadow of the giant skyscrapers of the financial district." *The Wholesale Fruit and Vegetable Markets of New York City* (U. S. Department of Agriculture, April 1940), p. 6.

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In addition to the high cost of land for the expansion of rail facilities so as to make available team-track delivery, the time required for handling cars across float bridges during periods of peak volume of traffic would render team-track delivery impracticable (I R. 23n; 286 I. C. C. 119, 130). The pier deliveries permit the expeditious handling of cars without switching operations or expense on Manhattan Island (I R. 23i, 23aa; 286 I. C. C. 119, 126, 141),[15] and the carriers are able to return the cars immediately for re-use whereas the consignees have two days free time to unload cars delivered at team tracks (I R. 23i; 286 I. C. C. 119, 126). A witness on behalf of the Erie Railroad stated that pier-station delivery on Manhattan Island is the most efficient method which the railroad has been able to adopt, and this method is so efficient that the carrier has been able to handle in one day, at piers 20 and 21, as many as 367 cars of fruits and vegetables, and it never handles less than 50 cars a day for pier-station delivery (I R. 23i; 286 I. C. C. 119, 126). All unloading by the carriers for pier-station delivery is performed with dispatch, and the cars after unloading are immediately returned empty to the New Jersey side, and

[15] The carriers incur the switching expense involved in team-track delivery, and there is no basis for the statement in the majority opinion that the Commission found that a switching charge is paid "by the consignee" (I R. 213; 114 F. Supp. 420, 424).

other car floats are placed at the piers for unloading (I R. 23g; 286 I. C. C. 119, 124). This method of making pier-station delivery is so expeditious that the same platform space may be used two or three times each night for unloading and stacking freight (I R. 23g; 286 I. C. C. 119, 124–125).

The Commission found in this case that the "most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float, as at the present time, to the pier platform for delivery to the consignee" (I R. 23n; 286 I. C. C. 119, 130). Pier-station delivery at New York, including unloading, was "inaugurated by the carriers concerned [during the latter part of the nineteenth century] for their own convenience and benefit," and this substitute for team-track delivery "is now and always has been the most economical way the carriers may make deliveries of freight at New York" (I R. 205; 114 F. Supp. 420, 425, Judge DeVane, Dissenting).

3. *The Commission Found That the Line-Haul Rates Included, Prior to This Proceeding, Compensation for Unloading, i. e., Delivering, the Freight*

The Commission found that for over 50 years prior to November 1, 1948, the railroads have been compensated for the unloading of fresh fruits and vegetables at New York and Philadel-

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phia by their line-haul rates. In its Report of May 7, 1952, the Commission stated that (emphasis supplied) "[p]rior to November 1, 1948, when the charges under consideration became effective, there were no *separate* charges *in addition to the through rates,* for unloading fruits, vegetables, or other descriptions of traffic at the stations specified" (I R. 23c; 286 I. C. C. 119, 121). "At the [Philadelphia] piers unloading, similar to the present operations at New York piers, was performed by the carriers without charge therefor *other than the line-haul rate.* In fact, delivery could not be accomplished without first unloading the freight. In 1927, the Pennsylvania and the Baltimore & Ohio constructed separate and competitive produce terminals, either of which was then capable of accommodating the needs of the fruit trade at that point, and at both of which unloading *under the line-haul rate,* as previously performed at the piers, was continued" (I R. 23r; 286 I. C. C. 119, 133–134; emphasis supplied). "This method of unloading had been performed by the carriers prior to November 1, 1948, without charge therefor *other than the line-haul rate"* (I R. 23t; 286 I. C. C. 119, 135; emphasis supplied). "The respondents have been willing to perform the unloading without a *separate* charge until, in recent years, the cost thereof substantially increased" (I R. 23z; 286 I. C. C. 119, 139–140; emphasis supplied). These unequivocal findings by the

Commission in 1952 cogently establish that, prior to the imposition of the delivery charges challenged in this case, the line-haul rates included compensation to the carriers for making delivery at New York and Philadelphia, including unloading.[16] The findings by the Commission in 1952, in this respect, are in conformity with prior decisions by the Commission in which the Commission found that the line-haul rates to the New York piers included compensation to the carriers for unloading. *Fruits and Vegetables to Duane Street, N. Y.,* 66 I. C. C. 135, 139; *Erie R. R. Co.* v. *A. & V. Ry. Co.,* 98 I. C. C. 268, 272, 280.

In *Fruits and Vegetables to Duane St., N. Y.,* 66 I. C. C. 135, the Erie Railroad attempted to impose a separate charge, in addition to the line-haul rates, for unloading and assorting fruits and vegetables at its New York piers. The railroad had previously unloaded the freight under its line-haul rates and had a separate charge covering assortment, but not unloading. A witness, Charles E. Bell, explained the proposal as follows: "Testimony has been given as to the cost

[16] The findings by the Commission, that compensation for delivery, including unloading, was included in the line-haul rates to the New York piers and the produce platforms in Philadelphia prior to November 1, 1948, are supported by substantial evidence on the record as a whole. See I R. 559; II R. 873, 883, 885, 889–891, 928–931, 951–953, 987–990, 995–996; III R. 997, 1001–1002, 1011–1013, 1064–1065, 1472–1473, 1496–1498.

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of unloading freight at Duane Street piers and at other terminals and an effort is made by the Erie Railroad to assess additional charges for this unloading service."[17] The issue was squarely presented as to whether the line-haul rates included compensation for the unloading service. The railroad contended that inasmuch as the line-haul rates on fresh fruits and vegetables had been blanketed east of the Missouri River, the line-haul rates did not include compensation for the unloading service.[18] The protestants, however, introduced weighty evidence proving that the line-haul rates included compensation for unloading.[19] For example, Mr. Charles E. Bell, a witness with 25 years of railroad traffic experience, including positions as assistant director of traffic of the Food Administration and assistant to the Director of Traffic, United States Railroad Administration, made a thorough analysis of the tariffs published or concurred in by the Erie

[17] *Investigation and Suspension Doc. No. 1420*, p. 342. This transcript of the record is on file in the National Archives. See, footnote 11, *supra*, p. 27.

[18] See Respondent's Brief in *Investigation and Suspension Doc. No. 1420*, pp. 15–20. In oral argument before the Commission, the attorney for the Erie Railroad asserted that "the line-haul rate as disclosed by the record in this case does not include compensation for the service for which we now seek compensation." *Investigation and Suspension Docket No. 1420*, p. 465.

[19] See, e. g., *Investigation and Suspension Doc. No. 1420*, pp. 65–69, 84, 182–193, 251–256, 331–372. See also, Exs. No. 8–25.

Railroad, and in connection with his exhibits numbered 8 to 25 in the proceeding, testified as follows: "These exhibits disclose that * * * [the] tariffs apply to fruits and vegetables to New York City, including Duane Street; that the Erie Railroad is a participating carrier in those tariffs without restriction; that Duane Street is a regular delivering station in New York for California fruit, and so advertised, as well as a delivering station for other kinds of freight. These exhibits are intended to disclose also that the line-haul rates include delivery service at the New York stations. Therefore, the addition of these proposed terminal charges have the effect of increasing the total charge for transportation on California fruit to New York City."[20] Based upon the evidence introduced at the hearing, the Commission found that the line-haul rates to the New York piers include compensation for delivery, including unloading. *Fruits and Vegetables to Duane Street,* N. Y., 66 I. C. C. 135, 139.

It is also significant that in other proceedings involving the line-haul rates on fruits and vegetables to points in the United States, including New York and Philadelphia, the destination carriers "emphasized the magnitude of their terminal services and costs, including unloading by them of the traffic as an essential part of delivery * * *" (Second Report on Further Hear-

[20] *Investigation and Suspension Doc. No. 1420*, p. 338. See also, exhibits 8–25, and pp. 331–372.

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ing Proposed by M. J. Walsh, Examiner, I R. 114). For example, in *Investigation and Suspension Doc. No. 5478,* relating to proposed increases in the line-haul rates on vegetables and avocados from the South to Official Territory, the carriers stressed the magnitude of the terminal operations at the New York piers, including unloading of the freight as a necessary part of delivery.[21] Based upon the evidence adduced by the railroads as to the great expense involved in delivering freight at the New York piers, including unloading, the Commission approved line-haul rates to New York which were 3¢ per 100 pounds higher than the rates to other cities in Official Territory. The Commission expressly stated that the "reason for the greater increase to New York is because of the more expensive terminal operations performed by the respondents there than at other cities in official territory." *Vegetables and Avocados from the South to Official Territory,* 269 I. C. C. 409, 410.

Also in the proceedings relative to the divisions of rates between Official and Southern territories, evidence was introduced on behalf of the Northern lines to prove that the "service performed and facilities provided by Northern lines for the

[21] The evidence with respect to the magnitude of the terminal operations at the New York piers, including unloading, is in *Investigation and Suspension Doc. No. 5478,* Vol. 2, pp. 88–91, 94–95, and 117. This is a public record on file in the Interstate Commerce Commission.

purpose of effecting prompt delivery and orderly distribution of fruits and vegetables inevitably requires the conclusion that the delivery service generally performed by the Northern lines on the fruit and vegetable traffic is a more valuable and costly service than the origin service performed by Southern carriers."[22] Included in the evidence was testimony as to the expensive terminal operations at the New York piers, including unloading, and exhibits itemizing the expenses of handling perishable freight at Philadelphia and at the New York piers, including unloading.[23] In summarizing the "principal factors reflective of the service contribution of the Northern lines in their road haul service north of the gateways,"[24] the Northern carriers, in their brief in the proceeding, included the expensive terminal operations, including delivery, at the New York piers stating that "[s]pecial equipment and facilities, with a complete marine organization are necessary for the floating service. The loading and unloading of car floats is difficult, hazardous,

[22] Brief in Behalf of Respondents Within Official Territory, p. 201 (in Vol. 50), Docket No. 24160, *Division of Rates, Official and Southern Territories.* This is a public record on file in the Interstate Commerce Commission.

[23] *Atlantic Coast Line R. Co.*, v. *Arcade & A. R. Corp.*, Docket No. 24069, Exs. 229, 230 (in Vol. 9); pp. 777–790, 833–834, 845–863 (in Vol. 7); pp. 1189–1201, 1205–1217 (in Vol. 9).

[24] Brief in Behalf of Respondents Within Official Territory, p. 194 (in Vol. 50), Docket No. 24160, *Division of Rates, Official and Southern Territories.*

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and expensive."[25] The Commission's report discussed the relevant transportation services rendered by the carriers, including the unloading by the carriers at the New York piers and the Philadelphia produce terminals. *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I. C. C. 729, 745–746.[26]

[25] *Id.* at p. 200.

[26] In *Erie R. R.* v. *Alabama & V. Ry. Company*, 98 I. C. C. 268, a vice president of the Erie Railroad, testified that the Erie desired to obtain a greater allotment or share of the total rates, and the witness stated that: "The services performed by the Erie Railroad include among other things * * * the special delivery to Duane Street, piers 20 and 21 * * * [and] the service of unloading the cars properly in the piers * * *." Vol. II, pp. 9–10, of the transcript of the record in Doc. No. 14244, see footnote 11, *supra*, p. 27. The vice president of the Erie also testified that: "There is an unloading cost at New York piers which has been passed upon by the Commission, and which they have decided is a necessary part of the through rate. They recognize that in this limited area, any freight in delivery must be moved promptly. They have decided also on general merchandise that it is not discriminatory for the carriers to unload the freight so as to clear the piers, but it is all the more necessary for the carriers to perform this service on perishable traffic, because there would not be room on the piers for the labor of the consignees." *Id.* at 84. It was stated in this proceeding by the attorney for the Erie Railroad that "under our tariffs to New York pier stations all carload freight is unloaded by the carrier * * *." *Id.* at 289. The exceptions by the railroads to the proposed report of the Examiner stated, on page 23 of the exceptions, that: "Under the rate it is our obligation to unload the freight on to the pier but for this service of sorting and piling we assess and collect from the consignees a separate and additional charge."

Similarly in *Florida R. R. Commissioners* v. *A. & R. R. R. Co.*, 144 I. C. C. 603, involving the line-haul rates on Florida citrus fruit, the carriers introduced evidence of the extraordinary expenses incurred in their terminal operations, including unloading at New York and Philadelphia.[27] The railroads also explained in detail the expensive terminal operations incident to delivery at the New York piers, including unloading by the carriers, in *Investigation and Suspension Docket No. 3705,* which was the proceeding to determine the line-haul rates on vegetables in the *Southeastern Vegetable case,* 200 I. C. C. 273.[28]

The Commission found, in the case at bar, that "[v]arious rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal services, including unloading, could not have been ignored in determining the line-haul rates" (I R. 24q; 272 I. C. C. 648, 662). Moreover, it cannot be assumed that the railroads gratuitously performed, for more than 50 years, the unloading or delivery service in New York and Philadelphia. *Interstate Commerce Commission* v. *Chicago &c. R'd Co.*, 186 U. S. 320, 336; *American Express Co.*

[27] III R. 1496–1498. See also exhibit No. 38, pp. 13–21, in the unprinted portion of the record in the case at bar.

[28] The evidence as to the unloading operation by the carriers at the New York piers is in *Investigation and Suspension Doc. No. 3705*, Vol. 6, pp. 1011–1018. This is a public record on file in the National Archives, see footnote 11, *supra*, p. 27.

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v. *United States*, 212 U. S. 522, 526–527, 532; *United States* v. *Wabash R. Co.*, 321 U. S. 403, 406; *Ex parte No. 104*, 209 I. C. C. 11, 20.

The findings by the Commission in its final report in 1952 clearly show that the unloading involved in this case is an essential part of the delivery of the freight, and that for over 50 years prior to the imposition of the challenged charges the carriers have been compensated for such delivery in their line-haul rates. The District Court, in sustaining the Commission's orders, erroneously attributed to the Commission findings antithetical to the findings made by the Commission. The District Court stated that the Commission is really deciding "where the carrier's line-haul service ends, and whether unloading is a justifiable additional service * * *" (I R. 213; 114 F. Supp. 420, 424). The Court then stated that the Commission "found that unloading is an additional service, wholly distinct from delivery * * *" (I R. 213; 114 F. Supp. 420, 424). But that is directly contrary to the Commission's findings. The Commission found that the consignees "are not permitted to take delivery of their freight" from the car floats (I. R. 23g; 286 I. C. C. 119, 125), that the "pier floor is the first place where, after the freight has been unloaded, delivery can be taken" (*Ibid.*), and that the proposed charges, in addition to the line-haul rates, were "for making delivery at New York piers" (I R. 23m; 286 I. C. C. 119, 129).

Hence it is irrelevant as to whether "adequate" compensation for these unloading services "is or should be" included in the line-haul rates. The issue is whether compensation *has been* included for these unloading or delivery services in the line-haul rates. There is no finding in the Commission's report in 1948 contrary to the Commission's findings in 1952 that for the past 50 years, prior to November 1, 1948, the line-haul rates have included compensation for unloading at New York and Philadelphia.

In addition, the foregoing ultimate conclusion by the Commission in 1948 is not supported by any evidence or adequate subsidiary findings. Indeed *no* evidence was introduced to show whether or not the carriers' line-haul rates adequately compensated the carriers for making delivery, including unloading, at New York and Philadelphia. As stated by the Examiner in his report on further hearing, "[i]n the instant proceeding, respondents not only failed to prove that the through charges are reasonable, but have taken the position that the reasonableness of the line-haul rates is irrelevant" (I R. 100).[29] Hence there could be no evidentiary basis for the Commission's statement (I R. 24q; 272 I. C. C. 648, 662) in 1948 that "[*f*]*or the purposes of*

[29] See also II R. 896, 957, 966 for repeated assertions and insistence by the railroads that this proceeding does not involve an issue as to the reasonableness of the line-haul rates, and that no evidence on that issue is relevant. The railroads failed to submit any evidence as to the reasonableness of the line-haul rates.

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this proceeding we are not convinced that *adequate* compensation for these unloading services is or should be included in the line-haul rates" (emphasis supplied). Moreover, there are no prefatory or subsidiary findings which give any support to the ultimate finding, and in the absence of any evidence as to whether the carriers are receiving adequate compensation in their line-haul rates for the delivery service involved in this case, the Commission could not validly make any prefatory or subsidiary findings necessary to explain and support its ultimate finding. This Court has repeatedly emphasized the need for clarity and completeness in the basic or essential findings in administrative orders, *infra,* pp. 79–81.

Significantly, the Commission's final report in 1952 contains no finding that the line-haul rates are inadequate to compensate the carriers for the delivery involved in this case. The Commission's findings in 1952 conclusively prove that the line-haul rates in effect prior to November 1, 1948, included unloading which, under the circumstances of this case, is an essential part of making delivery, and the Commission did not in 1952 make any finding that the line-haul rates do not adequately compensate the carriers for making such delivery. The Commission's report in 1952 contains approximately 11,000 words, and undoubtedly the Commission would have added at least a sentence asserting that the line-haul rates are inadequate to compensate the carriers for

unloading or making delivery if the Commission believed that the evidence, after two further hearings, warranted such a finding. The Commission's report in 1948 contains approximately 7,000 words as compared with 11,000 words in the 1952 report. The Commission's report in 1952 sets forth the entire basis for the Commission's action, and there is no basis for any assertion that the Commission's report in 1952 is merely an abbreviature of the Commission's report in 1948. The Commission must have recognized in 1952 that it could make no such finding in the absence of *any* evidence as to the inadequacy of the line-haul rates to compensate the carriers for making delivery of fruits and vegetables at New York and Philadelphia. Hence the ultimate finding by the Commission in 1948, that "[f]or the purposes of this proceeding we are not convinced that *adequate* compensation for these unloading services is or should be included in the line-haul rates" (emphasis supplied), is without any weight in this proceeding and certainly does not support the District Court's statement that "the Commission found that the line-haul service terminated when the cars reached the pier station * * *" (I R. 214; 114 F. Supp. 420, 424).

The Commission also stated in its 1948 report that the charges for unloading at New York and Philadelphia "are in substantially the same category as those for switching, transit, refrigeration, and various other special services for which

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separate charges are published" (I R. 24q; 272 I. C. C. 648, 662).[30] But this is not the equivalent of a finding that the *prior* line-haul rates did not include compensation for making delivery, including unloading. As stated in *Railroad Board* v. *Duquesne Co.,* 326 U. S. 446, 453, the "duty of unloading carload freight ordinarily rests with the shipper or consignee. * * * But it is a transportation service within the meaning of the Interstate Commerce Act. * * * Its cost may be included in the line-haul tariffs or separately fixed or allowed as an additional charge." Hence even in areas where unloading is not an integral part of making delivery, and is in fact an accessorial service, its cost "may be included in the line-haul tariffs" (326 U. S. at 453). See also, *Atchison Railway Co.* v. *United States,* 232 U. S. 199, 221. The Commission, in its 1948 report, did not find that the unloading costs were separately fixed or allowed as an additional charge

[30] That statement of the Commission's ultimate conclusion in 1948 is not supported by any evidence or subsidiary findings, and is contrary to the Commission's findings in 1952 that the unloading involved is an essential part of the delivery of the fruits and vegetables, *supra*, pp. 30–33. That statement in 1948 is also squarely contrary to the Commission's findings and conclusions in *Fruits and Vegetables to Duane St., N. Y.*, 66 I. C. C. 135, 139, that the terminal services at the New York piers, including unloading, "are all incidental to the efficient delivery of fruits and vegetables at Duane street. They are performed on all of that traffic and in no sense are special services comparable with refrigeration, reconsignment, or switching after placement at unloading point."

prior to November 1, 1948, and therefore there is no finding by the Commission in 1948 inconsistent with the Commission's findings in 1952 that for over 50 years prior to November 1, 1948, compensation for delivery of fruits and vegetables at New York and Philadelphia, including unloading, had been included in the line-haul rates, *supra,* pp. 36–38.

The Court's conclusion that "the Commission found that the line-haul service terminated when the cars reached the pier station * * *" (I R. 214; 114 F. Supp. 420, 424) is manifestly erroneous and is responsible for the Court's erroneous decision in this case. As stated by Judge DeVane, dissenting, the "following undisputed factual questions" are controlling of the case:

> 1. Unloading at New York was originally inaugurated by the carriers concerned for their own convenience and benefit.
>
> 2. It is now and always has been the most economical way the carriers may make deliveries of freight at New York.
>
> 3. The line-haul rates were originally established to include and have always included compensation for unloading costs at New York. The Interstate Commerce Commission has so held in numerous cases.
>
> 4. When the unloading charges were made effective by the Interstate Commerce Commission the line-haul rates were then, and are now, in excess of just and reason-

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able rates based upon the cost of transporting and unloading fruits and vegetables at New York (I R. 205; 114 F. Supp. 420, 425–426).

B. THE COMMISSION'S APPROVAL OF SEPARATE CHARGES FOR MAKING DELIVERY OF FRESH FRUITS AND VEGETABLES IS INVALID

The Commission found that the unloading involved in this case is an essential part of making delivery of the fresh fruits and vegetables consigned to New York and Philadelphia, and that the proposed charges, in addition to the line-haul rates, are "for making delivery" at the designated terminals, *supra,* pp. 30–36. The Commission further found that such delivery was included under the line-haul rates prior to the imposition of the charges challenged in this proceeding, *supra,* pp. 36–53. Nonetheless the Commission approved separate charges for making delivery, and the approval was without any finding that the proposed aggregate charges, consisting of the line-haul rates plus the delivery charges, are just and reasonable for the transportation involved, including delivery. This action by the Commission is manifestly erroneous.

1. The Railroads Are Obligated To Make Delivery

It is manifest that the undertaking of a common carrier to transport goods necessarily includes the duty of delivering the goods to the consignee. *North Penn. Railroad* v. *Commercial*

Bank, 123 U. S. 727, 733–734; *Covington Stock-Yards Company* v. *Keith,* 139 U. S. 128, 135; *Rainier Co.* v. *Great Northern Co.,* 259 U. S. 150, 155; *Norfolk Railway* v. *Public Service Comm.,* 265 U. S. 70, 74. The term "transportation" as used in the Interstate Commerce Act has a special definition which enlarges its ordinary meaning so as to include more than the actual movement from origin to destination. 49 U. S. C. § 1 (3). The definement of the term includes "* * * all instrumentalities and facilities of shipment or carriage * * * and all services in connection with the receipt, delivery * * * and handling of property transported." 49 U. S. C. § 1 (3).

Delivery is a part of transportation under the Interstate Commerce Act. *Southern Ry.* v. *Prescott,* 240 U. S. 632, 637. See, also, *Erie R. R. Co.* v. *Shuart,* 250 U. S. 465, 468; *Danciger* v. *Cooley,* 248 U. S. 319, 327; *New York Central & H. R. R. Co.* v. *General El. Co.,* 219 N. Y. 227, 234, 114 N. E. 115, 117, certiorari denied, 243 U. S. 636; *Ex parte No. 104,* 209 I. C. C. 11, 20–33. "A carrier does not fulfill this obligation to deliver by merely providing a place where goods may be taken out of a car, but it must also provide a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property." *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.,* 161 I. C. C. 641, 644.

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2. *The Imposition of Separate Charges, in Addition to the Line-Haul Rates, for Making Delivery at a Point Within the Carriers' Terminals Is Illegal*

It is an axiomatic principle, in the transportation law of the United States, that delivery is included under the line-haul rates. "The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery. * * * The rate, which it is required shall be published, is a complete rate, which includes not only the charge for hauling, but the charge for the use of the terminals at both ends of the line. * * * The railroads recognize their duty to make delivery under the flat rate stated in their tariffs * * *." *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.*, 18 I. C. C. 310, 314–315. Based upon those fundamental principles, the Commission held in the *Associated Jobbers* case that the railroads delivering freight at private sidings or spurs at Los Angeles in lieu of team-track delivery could not impose an additional charge for such delivery. As stated by the Commission (18 I. C. C. 310, 317–318):

> If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a sidetrack delivery which costs the carrier no more, he may

> not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done.

The decision and order by the Commission in the *Associated Jobbers* case was upheld in *Interstate Commerce Commission* v. *A., T. & S. F. Ry. Co.,* 234 U. S. 294. The decision in that case is apposite in this proceeding since the pier-station delivery at New York is merely a substitute for team-track delivery and is the most economical way the carriers may make deliveries of freight at New York, *supra,* pp. 33–36. Similiarly, in *United States* v. *Am. Tin Plate Co.,* 301 U. S. 402, 409, the Court stated:

> It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a "switching district" or "switching limits." Within that area the carrier holds itself out as agreeing to deliver from in its freight depot or at team tracks or on sidings or spur-tracks owned by an industry.

In *Atchison Ry.* v. *United States,* 295 U. S. 193, 200, involving the delivery of livestock at Chicago, it was held that "[l]ong continued practice and special conditions made unloading at

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these yards a transportation service to be performed by the carrier" under the line-haul rates. See also, *Adams* v. *Mills,* 286 U. S. 397, 409–416; *United States* v. *U. S. Smelting Co.,* 339 U. S. 186, 189–190. The Commission has held that under "general custom and practice the line-haul rate entitles a consignee to have his shipment delivered at a reasonably convenient place, whether this be within a plant, or upon a track agreed upon by him and the carriers." *Ex parte 104,* 209 I. C. C. 11, 32.

It has been familiar doctrine since *Covington Stock-Yards Co.* v. *Keith,* 139 U. S. 128, that a railroad is under a legal obligation to provide suitable and necessary means and facilities for receiving live stock offered for shipment and for delivering the freight after it reaches the place to which it is consigned, and that the carrier cannot impose any charge in addition to the through rate for performing such services. The "transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession." *Covington Stock-Yards Co.* v. *Keith,* 139 U. S. 128, 136. In resolving the issues presented in the *Keith* case, the Court stated the rule, applicable to live stock or other freight, that all freight must be delivered at the place of destination to the party designated

to receive it if he presents himself or can with reasonable efforts be found (139 U. S. at 135), and that "[n]o obligation of the carrier, whether the freight consists of goods or live stock, is more strictly enforced" (139 U. S. at 135). "The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered. A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars" (139 U. S. at 135).

The decision of the Commission in this case, approving separate charges for unloading, *i. e.,* delivering, fresh fruits and vegetables at the New York piers and at the platforms in Philadelphia, is manifestly contrary to the rule established in the prior decisions of this Court, *supra,* pp. 55–59,

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and in addition the decision of the Commission is contrary, in principle, to the Commission's action in *Ex parte 104*, 209 I. C. C. 11.[31] The Commission recognized in its main report in *Ex parte 104* that delivery is included in the line-haul rates in this country, and that the carriers can impose an additional charge for making the freight available to the consignee only when the carrier is prevented from making delivery "by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances * * *." *United States* v. *Wabash R. Co.*, 321 U. S. 403, 406–407. "Transportation includes delivery and what it is asked as to complete it the carrier must do." *Hanna Furnace Corporation* v. *United States*, 53 F. Supp. 341, 343 (3-judge Court, W. D. N. Y.), affirmed, 323 U. S. 667. The "main basis" for the Commission's decision in *Ex parte 104* is that interference and interruption *by the industry* may obviate the necessity of delivery under the line-haul rates (53 F. Supp. at 345). Accord: *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 189–190; *United States* v. *Am. Tin Plate Co.*, 301 U. S.

[31] In *Ex parte 104*, 209 I. C. C. 11, the Commission initiated an extensive investigation of the service rendered by carriers in spotting cars at points upon the systems of plant trackage maintained by numerous large industries to determine whether the carriers had assumed a burden not included in the transportation service compensated by the filed tariffs.

402, 405, 409; *Corn Products Refining Co.* v. *United States,* 69 F. Supp. 869, 872 (3-judge Court, N. D. Ill.), affirmed, 331 U. S. 790.

The Interstate Commerce Act, as interpreted by the Commission and by the Courts, *supra,* pp. 55–60, does not permit carriers to segregate their delivery charges from their line-haul rates. Section 6 (1) of the Interstate Commerce Act permits separate terminal charges, but not separate delivery charges (49 U. S. C. § 6 (1)). Section 6 (1) of the Act requires all carriers subject to the Act to publish with the Commission and keep open to public inspection schedules showing all the rates, fares, and charges for transportation, and such schedules "shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee" (49 U. S. C. § 6 (1)). But as we have shown, *supra,* pp. 55–60, carriers are required to make delivery under their line-haul rates. This difference between the American system of rate making and the English system, in which delivery

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charges are separately stated, was recognized by the Commission in *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.,* 18 I. C. C. 310, 314–315, as follows:

> The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery. These various services may be broken up into their component parts and a charge imposed for each, as is the case in England, where by law the Government has fixed a schedule of maximum rates for "conveyance" between stations and a separate schedule of maximum terminals, so called, which includes a fixed charge, uniform throughout the country, for a "station terminal" at each end of the haul, if the station is used, but not otherwise. So that, under the English system, in order to arrive at the total rate applicable upon a shipment, the conveyance rate must be added to the station terminal. ("Service terminals" for loading and unloading, etc., are also separately stated and charged for.) This method of stating rates has never obtained in this country, at least so far as the records of this Commission show. The rate, which it is required shall be published, is a complete rate, which includes not only the charge for hauling, but the charge for the use of the terminals at both ends of the line.

The provisions of the act to regulate commerce were enacted with respect to the American method of stating rates, and when it is provided in section 6 that the schedules, which shall be published and filed with the Commission, "shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed," it was not intended that the carriers should be required to separately state what are known in the English law as station terminals—that is to say, that they shall state separately the hauling charge between the stations and the charge for the use of the terminal at both ends of the line. The terminal charges referred to in section 6, and which *must* be expressly set forth in the carrier's tariff, are those for other services at the terminal which the carrier may furnish, such as storage, elevation, switching, and cartage. This construction of the act is borne out fully by its history and has been formally accepted by railroad counsel in advising the carriers. The railroads recognize their duty to make delivery under the flat rate stated in their tariffs, and such delivery is made upon industry tracks, which are part of the carrier's terminals, without additional charge.[32]

[32] The validity of the order in the *Associated Jobbers* case was upheld in *Interstate Commerce Commission* v. *A., T. & S. F. Ry. Co.*, 234 U. S. 294, but the Court found it unnecessary to decide whether the Commission correctly stated the

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In circumstances where unloading is an accessorial service distinct from delivery, its "cost may be included in the line-haul tariffs or separately fixed or allowed as an additional charge." *Railroad Board* v. *Duquesne Co.*, 326 U. S. 446, 453. But there is no statutable requirement that an unloading charge must be separately stated, and where unloading is an essential part of making delivery the Act does not authorize a separate charge for making delivery.

3. *The Approval by the Commission of Separate Charges for Making Delivery of Fresh Fruits and Vegetables—a Transportation Service Previously Included Under the Line-haul Rates—Is Also Invalid Because the Commission Did Not Find That the Entire Charges for the Transportation Involved, Consisting of the Line-haul Rates Plus the Delivery Charges, Are Just and Reasonable*

Railroads are obligated to make delivery of freight under their line-haul rates, and the imposition of separate charges, in addition to the line-haul rates, for making delivery of fresh fruits

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law, in this respect (234 U. S. at 310). However, the administrative interpretation of the statute is a contemporaneous and settled administrative interpretation, established over a period of 44 years, and is of great weight and should not be overturned unless the interpretation is clearly wrong or unless a different construction is plainly required. *United States* v. *Jackson*, 280 U. S. 183, 193; *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 549; *Boutell* v. *Walling*, 327 U. S. 463, 470–471; *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116.

and vegetables at New York and Philadelphia is illegal, *supra,* pp. 55–63. But assuming, *arguendo,* that for the future the carriers may establish line-haul rates which do not include delivery, and that the carriers may establish in their tariffs additional charges "for making delivery" (I R. 23m; 286 I. C. C. 119, 129), nonetheless the decisive fact is that they have not done so in the past. The prior line-haul rates included delivery, *i. e.,* unloading at New York and Philadelphia, and, therefore, it is impossible to determine whether an additional charge for delivery is just and reasonable without considering the entire line-haul rates.

A carrier should not be permitted to multiply its revenue by merely dividing its rates. The Commission cannot approve, as just and reasonable, a separate charge for a transportation service previously included under the line-haul rate, unless the Commission finds that the aggregate of the line-haul rate plus the separate charge is just and reasonable for the transportation service rendered.[33]

In *Interstate Commerce Commission* v. *Chicago &c. R'd Co.,* 186 U. S. 320, the issues related to a

[33] This finding could be stated in two parts, *i. e.,* that the line-haul rate is just and reasonable for the transportation service rendered excluding the service for which a separate charge is stated, and in addition that the separately stated charge is just and reasonable for the separate transportation service. In that case the aggregate of the two charges would necessarily be just and reasonable for the total transportation service rendered.

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terminal charge imposed by the carriers for making delivery to the stockyards at Chicago, "a point beyond the lines of the respective carriers", and for many years prior to the imposition of the separate terminal charge, the carriers had delivered carloads of cattle to the stockyards without making any charge therefor other than the line-haul rates (186 U. S. at 335).[34] In these circumstances the Court held that although "the terminal charge of $2, abstractly considered, would be just and reasonable" nonetheless that did not indicate that the $2 charge was just and reasonable as applied to the facts of the case inasmuch as "compensation for the terminal service was presumptively included in the through rate existing for so many years, and therefore, the $2 did not constitute the terminal rate, but * * * such rate

[34] Although the issue as to the legality of separately stating the terminal charges was not raised, the Court expressed the view that the carriers had a right to divide their rates and separately state terminal charges at "a point beyond the lines of the respective carriers," but the Court expressed no opinion as to whether such separate charges could be made applicable "to terminal services by a carrier on his own line which he was obliged to perform as a necessary incident of his contract to carry, and the performance of which was demanded of him by the shipper * * *" (186 U. S. at 335). Also, the Court held that even after the carriers separately stated terminal charges of $2.00 per car, the carriers had not divided their charges so as to segregate their line-haul rates from their terminal charges, stating that "[w]e think that it cannot be said that to add an additional amount to a former charge was necessarily to divide such former charge, without holding that to add one sum to another is necessarily to divide the other" (186 U. S. at 337).

after the $2 was imposed consisted of that sum plus the amount of compensation for the terminal service which had always been contained in, and which continued to be embraced in, the through rate" (186 U. S. at 337). In the absence of other circumstances, the Court would have sustained the order of the Commission setting aside the charge of $2.00 as unjust and unreasonable (186 U. S. at 338), but the Court held that the reasonableness of the entire charges for the transportation must be considered, *i. e.,* the line-haul rates plus the terminal charge, and since the line-haul rates had been reduced about $10.00 to $15.00 per car, the Court held that the $2.00 terminal charge was just and reasonable.

The principle that the Commission cannot approve a separate charge for unloading or making delivery, without finding that the "aggregate charge for the through service is reasonable" was also recognized by the Commission in *Unloading Lumber at New York Harbor,* 256 I. C. C. 463, 468, in which it was held:

> The unloading here considered is required in order to make delivery at respondent's lighterage stations in New York Harbor . . . The nature and incidents of the unloading service here considered establish beyond a doubt that it is inextricably bound up with the line-haul service. It follows that respondents may not now segregate a component of that service, making a separate charge therefor, without an

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> adequate showing that the aggregate charge for the through service is reasonable. Compare *Lighterage and Storage Regulations at New York,* 35 I. C. C. 47, 61. As such a showing was not made respondents have not met the requirements of the statute in that respect and accordingly have not sustained their burden as to the reasonableness of the proposed charge.

The same issue was also presented in *Fruits and Vegetables to Duane St., N. Y.,* 66 I. C. C. 135, 139, which involved two proposals by the Erie Railroad, the second of which was "to establish terminal charges on fruits and vegetables at its Duane Street station." Those terminal charges were intended to cover the two services of unloading and sorting and were to take the place of lower charges, previously in effect, which covered only the sorting service. In finding the proposed unloading and sorting charges not justified, the Commission held:

> The terminal charges present a somewhat different problem. It is proposed that they shall apply on all fruit and vegetable traffic delivered at Duane street station. As is customary on Manhattan Island, delivery, including unloading, has heretofore been made at Duane street under the line-haul rates. * * * The services for which the proposed terminal charges are published are all incidental to the efficient delivery of fruit and vegetables at Duane street. They are performed on all

> of that traffic and in no sense are special services comparable with refrigeration, reconsignment, or switching after placement at unloading point. Respondent makes no showing as to the adequacy of the compensation now received by the carriers for the through service on this traffic, merely pointing out that the rates on California fruit are blanketed to all territory east of the Colorado common points and that 15 years ago, when the traffic began to be handled in the manner above described, no corresponding increase was made in the through rates. This blanket has been voluntarily maintained by the carriers for many years and appears to have been satisfactory to all concerned. We find that the establishment of terminal charges higher than the present assorting charges has not been justified.

In *Lighterage and Storage Regulations at New York,* 35 I. C. C. 47, the Commission held invalid a proposed separate unloading charge to be added to the line-haul rates because the railroads had not shown the reasonableness of their line-haul rates. The basis for the Commission's decision, which is squarely applicable in the case at bar, is as follows (35 I. C. C. 47, 61):

> The assessment of any charge for terminal handling, the service having heretofore been performed under the freight rate, would have the effect of increasing that rate; and a proper justification of such an

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increase would involve consideration both of the line-haul and the terminal service to be performed under the increased rate. There is no evidence to warrant any finding upon the adequacy of the compensation now received by the carriers for their complete service.

* * * * *

The Commission strongly favors the analysis of service and rates as an aid to their measurement and comparison. But it holds that, *where a terminal service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not now segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation heretofore received for such through service.* [Emphasis supplied.]

This principle was also recognized in *Terminal Charges at Pacific Coast Ports,* 255 I. C. C. 673, 677, where a separate charge for terminal service, including unloading, was not shown to be just and reasonable. It was there held:

> We have frequently approved the separation of certain charges for accessorial services from the line-haul rates. But this has only been upon a clear showing that the resulting separate charges for each portion

> of the total services were just and reasonable. In a number of these instances, the inclusion of certain services in the line-haul rates was for the benefit of particular shippers, and the extra cost entailed was not considered when the level of the line-haul rates was determined. Here, however, the entire body of these export and import rates have been established and maintained and adjusted over a long period of time in contemplation of the performance by respondents of these terminal services as a part of the through transportation to and from the docks. *Their proposal to establish an additional charge for a portion of the through services is not reasonable unless there is a clear showing that the existing rates are reasonable for the line-haul services alone, or that the increased total charges are reasonable for the aggregate services.* [Emphasis supplied.]

Commissioner Knudson, dissenting, in the Commission's report dated May 7, 1952, challenged in this proceeding, referred to the prior decisions by the Commission, which the Commission ignored in this case, stating:

> In several reports the Commission found that charges for unloading freight at New York piers incident to delivery to the consignee were included in the line-haul rates; that "delivery to the consignee is not effected until the cars are unloaded and the lading placed at a convenient location on the pier floor"; and that where a terminal

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service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation theretofore received for such through service. *Lighterage and Storage Regulations at New York,* 35 I. C. C. 47; *Bills of Lading,* 52 I. C. C. 671; *Erie R. Co.* v. *Alabama & V. Ry. Co.,* 98 I. C. C. 268; *Fruits and Vegetables to Duane St., N. Y.,* 66 I. C. C. 135; *Allowances for Stacking,* 179 I. C. C. 780; *Unloading Lumber at New York Harbor,* 256 I. C. C. 463. These reports, supporting protestants' contention herein and specifically referred to in the examiners' proposed reports, are omitted from the report of the majority (I R. 23ee–23ff, 286 I. C. C. 119, 144).

The decisions by this Court and by the Commission, *supra,* pp. 64–71, require that the Commission's orders in this case, approving the delivery charges, be set aside. For over 50 years the carriers have included unloading of freight at New York and at certain terminals at Philadelphia as an integral part of the delivery required to be made under their line-haul rates, *supra,* pp. 30–53, and the carriers cannot now impose a separate charge on a component part of the transpor-

> of the total services were just and reasonable. In a number of these instances, the inclusion of certain services in the line-haul rates was for the benefit of particular shippers, and the extra cost entailed was not considered when the level of the line-haul rates was determined. Here, however, the entire body of these export and import rates have been established and maintained and adjusted over a long period of time in contemplation of the performance by respondents of these terminal services as a part of the through transportation to and from the docks. *Their proposal to establish an additional charge for a portion of the through services is not reasonable unless there is a clear showing that the existing rates are reasonable for the line-haul services alone, or that the increased total charges are reasonable for the aggregate services.* [Emphasis supplied.]

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service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation theretofore received for such through service. *Lighterage and Storage Regulations at New York,* 35 I. C. C. 47; *Bills of Lading,* 52 I. C. C. 671; *Erie R. Co.* v. *Alabama & V. Ry. Co.,* 98 I. C. C. 268; *Fruits and Vegetables to Duane St., N. Y.,* 66 I. C. C. 135; *Allowances for Stacking,* 179 I. C. C. 780; *Unloading Lumber at New York Harbor,* 256 I. C. C. 463. These reports, supporting protestants' contention herein and specifically referred to in the examiners' proposed reports, are omitted from the report of the majority (I R. 23ee–23ff, 286 I. C. C. 119, 144).

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tation service previously covered by their line-haul rates without showing the reasonableness of the aggregate charges for the transportation service rendered. Even assuming, *arguendo,* that because of an increase in the cost of unloading, the carriers are no longer *adequately* compensated for making delivery in their line-haul rates, the decisive fact is that the line-haul rates prior to November 1, 1948, included payment for the delivery, including unloading, performed at New York and Philadelphia, *supra,* pp. 36–53. It is, therefore, impossible to determine whether the proposed delivery charges are just and reasonable without determining the extent to which payment is being made for the delivery in the line-haul rates.

No evidence was introduced to show that the railroads are not being adequately compensated in their line-haul rates for the entire transportation rendered, including delivery, and it is significant that the Commission did not, in its final report in 1952, make any finding that the carriers are not adequately compensated in their line-haul rates for making delivery. "In the instant proceeding, respondents not only failed to prove that the through charges are reasonable, but have taken the position that the reasonableness of the line-haul rates is irrelevant" (I R. 100). Various rate increases have been granted in the line-haul rates from time to time, and effective October 6, 1947, a 30% increase in all

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freight rates was approved by the Commission (I R. 23b; 286 I. C. C. 119, 120). Subsequently, additional increases in freight rates of 10% [35] and 15% [36] were approved by the Commission. The increases of 30%, 10%, and 15% were cumulative, so that the aggregate increase in freight rates since October 1947 is approximately 64%.[37] But assuming, *arguendo,* that even with these increases the railroads are not being adequately compensated for the transportation rendered, the entire line-haul rates must be considered and evidence adduced must warrant a finding by the Commission that the entire charges proposed for the transportation, including delivery, consisting of the line-haul rates plus the proposed delivery charges, are just and reasonable. Otherwise the railroads will be receiving double payment for the service rendered. The extent, if any, to which the railroads are not at present being adequately compensated for making delivery under their line-haul rates—and, therefore, the extent to which an additional charge may now be imposed for making delivery—cannot be determined with-

[35] *Increased Freight Rates, 1948*, 272 I. C. C. 695, 276 I. C. C. 9, 279 I. C. C. 303.

[36] *Increased Freight Rates, 1951*, 280 I. C. C. 179, 281 I. C. C. 557, 284 I. C. C. 589, 289 I. C. C. 395.

[37] A limitation was provided in the Commission's decisions approving the increased rates as to the line-haul rates on fresh fruits and vegetables, but the aggregate increase in the line-haul rates on carload shipments of these commodities is almost as great as the increase in the rates for other freight.

out considering the reasonableness of the entire line-haul rates.

At any hearing involving a change in a rate, fare, or charge the "burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable * * *" (49 U. S. C. § 15 (7)). The respondents, by failing to prove the reasonableness of the aggregate charges for the transportation to be rendered, have failed to sustain the burden of proof in this proceeding, and the Commission's orders approving the proposed charges are not supported by any evidence or findings in this respect. No valid order can be issued in this proceeding until the carriers demonstrate the reasonableness of their aggregate charges, *i. e.,* their line-haul rates plus the delivery charges, for the transportation service rendered. The orders of approval by the Commission in this case fail to observe the statutory requirements relative to the approval of rates or charges as just and reasonable. An order of the Commission which fails to apply a proper statutory standard is invalid, and should be set aside. *United States* v. *Carolina Carriers Corp.,* 315 U. S. 475, 489. Action by an administrative agency which is not consonant with an applicable statute, or which "operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan Co.* v. *Commissioner,* 297 U. S. 129, 134.

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If the railroads are entitled to an increase in revenue because of the increased costs of unloading, the respondents have an adequate remedy under the Act for procuring such additional revenue. The delivering carriers, *i. e.*, the railroads in this case, incur a large proportion of the total costs involved in the transportation of freight to New York and Philadelphia from various parts of the country, but they are compensated, for the costs of making delivery, in the line-haul rate divisions. Before computing the division of the line-haul rates between the carriers involved, the delivering carriers receive an allowance out of the line-haul rates, and the balance is then divided among the carriers (I R. 100; II R. 571, 588). If the delivery costs have increased to the extent that the delivering carriers no longer receive an equitable division of the line-haul rates, the delivering carriers may secure an equitable division of the line-haul rates under § 15 (6) of the Act which provides:

> Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise estab-

> lished), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers * * *. In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to * * * whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge (49 U. S. C. § 15 (6)).

If the facts subsequently adduced at a hearing under § 15 (6) of the Act reveal the need for a further allowance in favor of the delivering carriers, the Commission has the power to authorize such an allowance. See *United States* v. *Great Northern,* 343 U. S. 562, 569–578; *Erie R. R. Co.* v. *A. & V. Ry Co.,* 98 I. C. C. 268. But the Commission cannot indirectly adjust the line-haul division in the present proceeding by imposing illegal charges for unloading, *i. e.,* delivering the freight. "Assuming the carriers are entitled to additional compensation for the cost of unloading freight at New York and Philadelphia, their remedy, under the Interstate Commerce Act, is to secure it by agreement with connecting carriers affected or make application to the Commission for a greater division of the line-haul rates to

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cover the needed additional costs instead of loading such costs on the farmers of this country" (I R. 207; 114 F. Supp. 420, 427, Judge DeVane, Dissenting).

II. THE ORDERS OF THE COMMISSION, APPROVING IDENTICAL DELIVERY CHARGES AT NEW YORK AND PHILADELPHIA EVEN THOUGH IT IS CONCEDED THAT DELIVERY COSTS AT PHILADELPHIA ARE SUBSTANTIALLY LOWER THAN AT NEW YORK, ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE OR ADEQUATE FINDINGS

The Commission found in 1952 that "[u]nloading operations are less expensive at Philadelphia than at New York" (I R. 23d; 286 I. C. C. 119, 122). The Commission also found in 1948 that the same disparity of costs existed (I R. 24s; 272 I. C. C. 648, 663). Nonetheless the Commission's orders in 1948 and 1952 approved identical charges for making delivery at New York and Philadelphia (I R. 24r; 272 I. C. C. 648, 663; I R. 23bb; 286 I. C. C. 119, 141).

The Commission, in its 1952 report, sets forth no basis for approving identical charges at New York and Philadelphia, stating merely that "[a]s indicated in the prior report, it is desirable that the charges for unloading at New York and Philadelphia be the same" (I R. 23bb; 286 I. C. C. 119, 141). But the Commission's report in 1948 manifests no basis for the Commission's approval of identical charges at New York and Philadelphia. To be sure, the 1948 report con-

cluded that: "The same schedule of charges was published for application at both New York and Philadelphia because of the long-standing competitive relation between those cities" (I R. 24c; 272 I. C. C. 648, 650),[38] "the record indicates the desirability of a parity of charges for unloading at New York and Philadelphia" (I R. 24r; 272 I. C. C. 648, 663), and "the charges for unloading should be the same at both points" (I R. 24r; 272 I. C. C. 648, 663). That statement of the Commission's ultimate conclusion is not supported by any evidence or adequate findings. Neither the evidence nor the Commission's reports afford any basis for concluding that there is a "desirability of a parity of charges" at New York and Philadelphia.[39]

With respect to commercial competition the Commission found that "[p]roduce dealers in the Philadelphia market are in competition with like dealers at points such as Baltimore, Md., Pittsburgh, Pa., and New York, because these markets are accessible to certain buyers who normally procure their fruits and vegetables in Philadelphia" (I R. 23u; 286 I. C. C. 119, 136).

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[38] This statement in the Commission's report is based entirely on the following statement, not based on any evidence, at page 10 of the railroads' *brief* before the Commission:

> The same charges were published at both New York and Philadelphia in order to preserve the long-standing relationship between these two cities.

[39] "It is no less inequality to have equality among unequals." Mr. Justice Frankfurter, dissenting, in *New York* v. *United States*, 331 U. S. 284, 353.

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Hence the commercial competition between New York and Philadelphia is but a phase of the general commercial competition among all eastern cities and affords no basis for imposing identical charges for making delivery at those two cities when, as is conceded, there is a substantial difference between New York and Philadelphia in the unloading or delivery expenses.

An order of the Commission is illegal if it is not based on adequate findings and substantial evidence on the record as a whole. *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U. S. 61, 81; *New York* v. *United States,* 331 U. S. 284, 301–310; *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, 583; *North Carolina* v. *United States,* 325 U. S. 507, 520; *Alabama* v. *United States,* 325 U. S. 535, 537; *Eastern-Central Motor Carriers Association* v. *United States,* 321 U. S. 194, 209–212; *City of Yonkers* v. *United States,* 320 U. S. 685, 689–692; *United States* v. *Baltimore and Ohio R. Co.,* 293 U. S. 454, 462–465; *Florida* v. *United States,* 282 U. S. 194, 215. Here, as in *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 488–489, an erroneous application of the law is obscured by vague findings. Nothing is revealed in the findings by the Commission as to why the unloading or delivery charges in New York and Philadelphia should be the same even though the unloading or delivery costs at Philadelphia are substantially lower than the costs at New York. The desir-

ability of "a parity of charges," for unloading or delivery in the two cities, is not made out by mere assertion. An assertion in the findings that it is desirable to establish "a parity of charges" for unloading or delivery in the two cities falls short of the criteria of clarity and completeness which were held to be necessary in *Colorado-Wyoming Gas Co.* v. *Federal Power Commission,* 324 U. S. 626, 634; *Automatic Canteen Co.* v. *Federal Trade Comm.,* 346 U. S. 61, 81. It is not the function of the Court to "search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report [of the Commission] intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order." *Atchison Ry.* v. *United States,* 295 U. S. 193, 201–202. Findings may not be supplied by implication. *Ibid.*

Since the Court is charged with the duty of reviewing the correctness of the standards which the governmental agency has applied and the essential fairness of the mode by which the agency reached its conclusions, the agency should do more than shelter its conclusions "behind uncritical generalities or such looseness of expression as to make it essentially impossible" for the Court to determine what really lay behind the conclusions which are being reviewed. *Automatic Canteen Co.* v. *Federal Trade Comm.,* 346 U. S. 61, 81. The assertions set forth in the find-

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ings by the Commission that the unloading charges at New York and Philadelphia should be the same notwithstanding a substantial difference in the unloading expenses are manifestly inadequate for the purpose of judicial review. Also assuming, *arguendo,* the adequacy of the findings, the record does not contain substantial evidence on which to support the findings and conclusions of the Commission.

III. THE CHARGES FOR MAKING DELIVERY OF FRESH FRUITS AND VEGETABLES AT NEW YORK ARE UNJUST DISCRIMINATIONS AND UNDUE AND UNREASONABLE PREJUDICES OR DISADVANTAGES IN VIOLATION OF §§ 2 AND 3 (1) OF THE INTERSTATE COMMERCE ACT INASMUCH AS SIMILAR PERISHABLE AGRICULTURAL COMMODITIES ARE DELIVERED AT NEW YORK UNDER THE LINE-HAUL RATES

The Commission found that prior to November 1, 1948, "when the charges under consideration became effective, there were no separate charges in addition to the through rates, for unloading fruits, vegetables, or other descriptions of traffic" at the New York piers (I R. 23c; 286 I. C. C. 119, 121). "The charges which became effective on that date apply only on fresh fruits and vegetables" (I R. 23c; 286 I. C. C. 119, 121). The Commission further found that "[a]s regards the movement of freight, other than fruits and vegetables, by car float to the New York piers, and the unloading of such freight to the pier platform, the operation is identical with the manner

in which fruits and vegetables are car-floated and unloaded" (I R. 23f; 286 I. C. C. 119, 123).

The carriers deliver all freight at the New York piers, other than fresh fruits and vegetables, without any charge other than the line-haul rate. Perishable agricultural commodities, *e. g.,* butter, cheese, eggs, dressed poultry, fresh meat, fish, oysters, and raw milk are included in the products delivered under the line-haul rates (I R. 23h; 286 I. C. C. 119, 125). The Hearing Examiner found that "respondents have continued to perform such unloading without charge in respect of other commodities at the identical New York pier stations at which charges are collected for unloading fruits and vegetables. For instance, canned fruit juices originating at points in Florida are unloaded without additional charge, other than the line-haul rate, at the same New York piers at which charges are collected for unloading fruits and vegetables. As there is keen competition between fresh fruits and fruit juices in household consumption, the assailed unloading charges are unduly prejudicial to fresh fruits and unduly preferential of fruit juices in violation of section 3 (1) of the act" (I R. 114). The Hearing Examiner concluded that upon "further hearing the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable,

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and that they are also in violation of section 3 (1) of the act" (I R. 115–116). The Commission reversed the Examiner's finding and stated that the "record does not warrant a finding of undue preference and prejudice or unjust discrimination in violation of section 2 or 3 of the act" (I R. 23bb; 286 I. C. C. 119, 142).

In its 1948 report, the Commission stated that the "substance of respondents' explanation for this seeming disparity of treatment is that since fruits and vegetables constitute the bulk of the shipments received at these stations, it was considered appropriate in the first instance to institute charges for unloading these perishables and to defer publication of similar charges on other traffic. It is indicated that consideration is being given to the establishment of unloading charges on traffic other than fruits and vegetables but that no definite conclusion has been reached" (I R. 24b; 272 I. C. C. 648, 649). In its 1952 report the Commission repeated that consideration is "being given by respondents to the establishment of unloading charges on traffic other than fresh fruits and vegetables, but as yet no definite conclusion in respect of such action has been reached" (I R. 23c; 286 I. C. C. 119, 121). In these circumstances set forth in the Commission's findings it is manifest that the fresh fruit and vegetable traffic has been discriminated against by the railroad carriers. There is no substance to the "respondents'

explanation [in 1948] for this seeming disparity of treatment" (I R. 24b; 272 I. C. C. 648, 649); the railroads have subjected the fresh fruit and vegetable traffic to an undue and unreasonable prejudice or disadvantage, and the railroads have unjustly discriminated against the fresh fruit and vegetable traffic in violation of §§ 2 and 3 (1) of the Act (49 U. S. C. §§ 2 and 3 (1)).[40]

Judge DeVane, dissenting in this case, concluded that:

> In my opinion the carriers not only failed to meet the requirements of Section 15 (7) of the Act, but the evidence in the case also clearly establishes a violation of Sections 2 and 3 (1) of the Act. Unloading is performed by the carriers of almost all perishable freight consigned to New York. The unloading charges are made applicable only to fruits and vegetables, while other similar perishable products, such as butter, butter solids, cheese, eggs, dressed poultry, fresh meat, fish, oysters, and raw milk, are unloaded by the carrier without the imposition of any unloading charges. This, in my opinion, constitutes a clear violation of Sections 2 and 3 (1) of the Act (I R. 205–206; 114 F. Supp. 420, 426).

The principal evil at which the Interstate Commerce Act is aimed is discrimination in its various manifestations. *New York* v. *United States,* 331

[40] This issue was raised in the administrative proceeding and in the District Court on review, and is properly before this Court on appeal. See Brief for the Secretary of Agriculture Opposing Motions to Affirm, pp. 2–6.

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U. S. 284, 296; *Louisville & N. R. Co.* v. *United States,* 282 U. S. 740, 749. It is the purpose of Congress to insure equality of treatment for all shippers by rail. *Chicago & Alton R. R. Co.* v. *Kirby,* 225 U. S. 155, 166; *New Haven R. R.* v. *Interstate Com. Comm.,* 200 U. S. 361, 391; *Union Pacific Railway* v. *Goodridge,* 149 U. S. 680, 690–691. The Act provides that the public interest shall be served by prohibiting discrimination between commodities by carriers, *i. e.,* one commodity is not to be penalized for the benefit of another. Section 2 of the Act proscribes as an "unjust discrimination" "any special rate * * * charge, [or] demand * * * from any person * * * for any service * * * in the transportation of passengers or property" which is greater or less than the charge or demand from any other person "for doing for him * * * a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions * * *." 49 U. S. C. § 2. Also, the Act prohibits any carrier from subjecting "any particular description of traffic to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever * * *." 49 U. S. C. § 3 (1).

The uncontroverted facts and the Commission's findings show that no special service is rendered by the railroads with respect to the transportation of fresh fruits and vegetables as contradistinguished from the other similar com-

modities. The railroads unload all of the commodities and then make delivery at the New York piers, *supra,* pp. 82–84. There is no evidence and no finding, by the Commission, that any special or distinctive service is performed by the carriers for which an unloading, *i. e.,* delivery, charge is warranted for fresh fruits and vegetables, but not for other similar commodities. "The chief purpose of the Act was to secure uniformity of treatment to all [and] to suppress unjust discriminations * * *." *Kansas City So. Ry.* v. *Albers Comm. Co.,* 223 U. S. 573, 597. "The provisions of the bill [which became the Interstate Commerce Act] are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations * * *" (Sen. Rep. No. 46, 49th Cong., 1st Sess., p. 215; *Id.* at pp. 176–182). "The purpose of the Act * * * was to provide one rate for all shipments of like character. * * * In this way discrimination is avoided, and all receive like treatment, which it is the main purpose of the Act to secure." *Pittsburgh &c. Ry. Co.* v. *Fink,* 250 U. S. 577, 581. To make an additional charge on fresh fruits and vegetables and no charge for the same transportation service for "a like kind of traffic" is on

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its face an unjust discrimination, and as such it is violative of § 2 of the Act (49 U. S. C. § 2). *Ayrshire Corp.* v. *United States,* 335 U. S. 573, 584. Moreover it is conflictive with the national transportation policy, as declared by Congress, to establish and maintain, *inter alia,* reasonable charges "without unjust discriminations." [41]

[41] 54 Stat. 899, 49 U. S. C. 1946 ed. p. 5443. Charging different rates "for equal service" is "a plain case of discrimination," and different rates "for equal service without any showing that any additional service was rendered for the additional charge" are violative of § 305 (c) of the Act which proscribes "unjust discrimination" by water carriers. *Alabama G. S. R. Co.* v. *United States,* 340 U. S. 216, 227. See also, *Interstate Commerce Comm.* v. *Mechling,* 330 U. S. 567. All of the provisions of the Act shall be administered and enforced with a view to carrying out the declaration of national transportation policy. 84 Cong. Rec. 9861–9866; *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 82–84; *Eastern-Central Motor Carriers Ass'n* v. *United States,* 321 U. S. 194, 206; *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612, 616–617; *Interstate Commerce Comm.* v. *Mechling,* 330 U. S. 567, 576. The provisions in §§ 2 and 3 (1) of the Act are similar to § 90 in The Railways Clauses Consolidated Act, 1845, 8 and 9 Vict. c. 20, and § 2 in The Railway and Canal Traffic Act, 1854, 17 and 18 Vict. c. 31. "It is the policy of Parliament that traders as a matter of indisputable right shall receive equal treatment." *North Staffordshire Rail. Co.* v. *Edge* [1920] A. C. 254, 262. See, also, *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Denaby Main Colliery Co.,* L. R. 14 Q. B. Div. 209, 224. The similarity between §§ 2 and 3 (1) of the Interstate Commerce Act and the above statutes in England has been recognized in cases under the Interstate Commerce Act. See, *e. g., Texas & Pac. Railway* v. *Interstate Com. Com.,* 162 U. S. 197, 222–234. See, also, Fifth Annual Report of the Interstate Commerce Commission (1891), p. 53; Aitchison, *The Evolution of the Interstate Commerce Commission:* 1887–1937, 5 George Washington L. Rev. 306 (1937).

The findings by the Commission, *supra,* pp. 82–84, show that the charges applicable to fresh fruits and vegetables result in other similar commodities, as to which no charges are imposed, having an "undue or unreasonable preference or advantage" in violation of § 3 (1) of the Act (49 U. S. C. § 3 (1)). A rail carrier cannot exact, for similar services, a higher rate from one class of shippers than from another. *Interstate Commerce Comm.* v. *Mechling,* 330 U. S. 567, 583. The special charge on fresh fruits and vegetables is not imposed because of any geographical situation or advantage peculiar to fresh fruits and vegetables (*Cf. Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42, 46), but this traffic is subjected to the charge without any reason for selecting it and, at the same time, leaving free from the charge other like commodities. The action by the Commission is repugnant to the cardinal purpose of the Act to wipe out "discriminations of all types" (*United States* v. *Baltimore & O. R. Co.,* 333 U. S. 169, 175). To be sure, the Commission said in its report in 1948 and again in its report in 1952 that the railroads are giving "consideration" to the establishment of comparable charges on traffic other than fresh fruits and vegetables, *supra,* pp. 83–84. But the statute prohibits discrimination; and it is not enough for the Commission to say that the railroads are willing to consider a proposal to equalize or remove the discrimination. The Com-

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mission has found, in this proceeding, that "the movement of freight, other than fruits and vegetables, by carfloat to the New York piers, and the unloading of such freight to the pier platform * * * is identical with the manner in which fruits and vegetables are carfloated and unloaded" (I R. 23f; 286 I. C. C. 119, 123). One commodity is not to be penalized for the benefit of another, and the discrimination in this case is set forth in the Commission's findings which reveal the arbitrary character of the discrimination.

The assertion in the findings by the Commission that the "record does not warrant a finding of undue preference and prejudice or unjust discrimination in violation of sections 2 or 3 of the act" (I R. 23 bb; 286 I. C. C. 119, 142) is refuted by the findings of the Commission that the services for fruits and vegetables are identical to the services for the other similar commodities, and neither the Commission's findings nor the record reveals or suggests any reason or basis for the discrimination.[42] The Commission's orders approving charges on fresh fruits and vegetables should be enjoined and set aside as violative of §§ 2 and 3 (1) of the Act (49 U. S. C. §§ 2 and 3 (1)).

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[42] The findings are inadequate in this respect, and for that reason also the action of the Commission is invalid. *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61, 81; *New York* v. *United States*, 331 U. S. 284, 301–310; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488–489; *Florida* v. *United States*, 282 U. S. 194, 215.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed, and the orders of the Commission, approving the separate charges on fresh fruits and vegetables, should be set aside and enjoined.

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APRIL 1954.

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APPENDIX

The following are the relevant provisions of the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088–1089):

SEC. 202. The Congress hereby declares that a sound, efficient, and privately operated system for distributing and marketing agricultural products is essential to a prosperous agriculture and is indispensable to the maintenance of full employment and to the welfare, prosperity, and health of the Nation. It is further declared to be the policy of Congress to promote through research, study, experimentation, and through cooperation among Federal and State agencies, farm organizations, and private industry a scientific approach to the problems of marketing, transportation, and distribution of agricultural products similar to the scientific methods which have been utilized so successfully during the past eighty-four years in connection with the production of agricultural products so that such products capable of being produced in abundance may be marketed in an orderly manner and efficiently distributed. In order to attain these objectives, it is the intent of Congress to provide for (1) continuous research to improve the marketing, handling, storage, processing, transportation, and distribution of agricultural products; (2) cooperation among Federal and State agencies, producers, industry organizations, and others in the development and effectuation of research and marketing programs to improve the dis-

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tribution processes; (3) an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and the price spread between the producer and consumer may be narrowed, that dietary and nutritional standards may be improved, that new and wider markets for American agricultural products may be developed, both in the United States and in other countries, with a view to making it possible for the full production of American farms to be disposed of usefully, economically, profitably, and in an orderly manner. In effectuating the purposes of this title, maximum use shall be made of existing research facilities owned or controlled by the Federal Government or by State agricultural experiment stations and of the facilities of the Federal and State extension services. To the maximum extent practicable marketing research work done hereunder in cooperation with the States shall be done in cooperation with the State agricultural experiment stations; marketing educational and demonstrational work done hereunder in cooperation with the States shall be done in cooperation with the State Agricultural extension service; market information, inspection, regulatory work and other marketing service done hereunder in cooperation with the State agencies shall be done in cooperation with the State departments of agriculture, and State bureaus and departments of markets (7 U. S. C. § 1621).

SEC. 203. The Secretary of Agriculture is directed and authorized:

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* * * * *

(j) To assist in improving transportation services and facilities and in obtaining equitable and reasonable transportation rates and services and adequate transportation facilities for agricultural products and farm supplies by making complaint or petition to the Interstate Commerce Commission, the Maritime Commission, the Civil Aeronautics Board, or other Federal or State transportation regulatory body with respect to rates, charges, tariffs, practices, and services, or by working directly with individual carriers or groups of carriers (7 U. S. C. § 1622 (j)).

The following are the relevant provisions of the Agricultural Adjustment Act of 1938 (52 Stat. 31, 36):

SEC. 201. (a) The Secretary of Agriculture is authorized to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same before the Commission. Before hearing or disposing of any complaint (filed by any person other than the Secretary) with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, the Commission shall cause the Secretary to be notified, and, upon application by the Secretary, shall permit the Secretary to appear and be heard (7 U. S. C. § 1291 (a)).

(b) If such rate, charge, tariff, or practice complained of is one affecting the public interest, upon application by the Secretary, the Commission shall make the Secretary a party to the proceeding. In such case the Secretary shall have the rights of

a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination. The liability of the Secretary in any such case shall extend only to liability for court costs (7 U. S. C. § 1291 (b)).

The following are the relevant provisions of the Interstate Commerce Act, as amended (24 Stat. 379, as amended; 49 U. S. C. § 1 *et seq.*):

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the

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above declaration of policy (49 U. S. C. preceding § 1).

* * * * *

SEC. 1 (3) (a). * * * The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported * * * (49 U. S. C. § 1 (3) (a)).

SEC. 1 (5). All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful (49 U. S. C. Supp. V § 1 (5)).

SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of

unjust discrimination, which is hereby prohibited and declared to be unlawful (49 U. S. C. § 2).

SEC. 3 (1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description (49 U. S. C. § 3 (1)).

SEC. 6 (1). Every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and

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charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part (49 U. S. C. § 6 (1)).

SEC. 6 (7). No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transporta-

tion of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs (49 U. S. C. § 6 (7)).

SEC. 15 (6). Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accord-

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ance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge (49 U. S. C. § 15 (6)).

SEC. 15 (7). Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its rea-

sons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or

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practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible (49 U. S. C. § 15 (7)).

SEC. 15a (2). In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service (49 U. S. C. § 15a (2)).

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